***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

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# 76-6199 & 77-4176

## United States Court of Appeals

**For the Second Circuit.**

UNITED STATES COURT OF APPEALS
JAN 05 1978
A. DAILEY
SECOND CIR.

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GENERAL MOTORS CORPORATION, A Corporation of the State of Delaware,

*Plaintiff-Appellee,*

*against*

THE LONG ISLAND RAILROAD COMPANY, A Corporation of the State of New York,

*Defendant-Appellant.*

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THE LONG ISLAND RAIL ROAD COMPANY,

*Third Party Plaintiff-Appellant,*

*against*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Third Party Defendants-Appellees,*

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

*Intervening Third Party Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

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## APPENDIX.

**Volume I—Pages 1a to 501a.**

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1978

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -X

GENERAL MOTORS CORPORATION, a Corporation of the State of Delaware,

*Plaintiff-Appellee,*

*-against-*

THE LONG ISLAND RAIL ROAD COMPANY, a Corporation of the State of New York,

*Defendant-Appellant.*

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -X

THE LONG ISLAND RAIL ROAD COMPANY,

*Third-Party Plaintiff-Appellant,*

*-against-*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Third-Party Defendants-Appellees,*

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

*Intervening Third-Party Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -X

DOCKET ENTRIES.

| Date | Proceedings |
|---|---|
| 1972 | |
| 11/14 | Complaint filed Summons issued. |
| 11/14 | Before Rosling, J. - Case called for hearing on pltff's motion for t.r.o.-Hearing held & contd to 12/7/72. |
| 11/15 | By Rosling, J.-Order to show cause & t.r.o. dtd 11/14/72 & memo of law with annexed summons & admission of service of same, ret. 12/7/72 at 2:15 PM for hearing on pltff's motion for prel inj filed. |
| 11/15 | By Rosling, J.-Order dtd 11/14/72 allowing personal service of S/C, & order to show cause & memo filed. |
| 11/24 | Stenographer's transcript of 11/14/72 filed. |
| 12/7 | Motion for t.r.o., ret. filed. & annexed temporary restraining order (By Rosling, J.) |
| 12/7 | Before Rosling, J.-Case called-Pltff present-Deft's counsel not present- |
| 1973 | |
| 2/8 | Respondent's and Petitioner's Joint Petition for Declaratory Reflief filed. |
| 2/20 | By ROSLING, J.-Order dated 2-16-73 filed giving parties to 3-5-73 to file petition to Interstate Commerce Commission for Resolution of the dispute. |
| 8/13 | Letter from Benson T. Buck dated 8-8-73 re: Opening Statement of facts and argument of petition filed. |
| 8-28 | Copy of letter from Richard H. Stokes dated 8-24-73 with annexed copy of opening statement of petition in argument of joint petitioner filed. |

DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1976 | |
| 3/30 | Letter dtd 3-25-76 to J. Mishler from Richard Stokes filed. |
| 4/1 | Third party complaint filed. T.P. summons issued. |
| 4/5 | Third-party summons returned and filed/executed. |
| 5/7 | Before MISHLER, J.-Case called to establish briefing schedule. All parties stipulate to the facts of the I.C.C. All briefs by 8-2-76 Trial date set down for 9-17-76. |
| 5/10 | Motion of National Industrial League for leave to intervene as third-party deft etc., filed. |
| 5/18 | By MISHLER, CH. J-ORDER GRANTING INTERVENTION OF THE NATIONAL TRAFFIC LEAGUE AS T.P. DEFT filed. 5-17-76 |
| 5/19 | Letter dated 5/12/76 filed from B. Buck to J. Mishler. |
| 6/1 | Answer of ICC to third-party complaint filed. |
| 6/2 | Answer of USA to third-party complaint filed. |
| 6/14 | Motion for permission to appear as counsel in this cause on behalf of GM Corp filed. |
| 6/14 | By MISHLER, CH. J-ORDER dtd 6-14-76 that the motion of Leonard F. Charla for permission to appear as counsel is granted. See document #20. |
| 7/30 | Memo of law of General Motors filed. |
| 8/2 | Brief on behalf of deft and third-party plntff, the LIRR Co. filed. |
| 8/2 | Joint brief of the Interstate Commerce Commission and the USA filed |
| 8/2 | Brief of National Industrial Traffic League filed. |

DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1976 | |
| 9/13 | Replt brief of GM filed. |
| 9/17 | Joint reply brief of USA & ICC filed; |
| 9/17 | Before MISHLER, CH. J-Case called. Appeal from the determination the ICC argued. Decision reserved. All briefs by 10-1-76. |
| 10-1 | Supplemental brief on behalf of deft & third party pltff. |
| 10-1 | Brief after trial of pltff GMC filed. |
| 11-19 | By MISHLER, CH. J-Memo of decision & Order dtd 11-19-76 granting pltff's application for a permanent injunction restraining the LIRR from suspending service to the ptlff's private tract because of GMC's refusal to assume the maintenance cost of the switch connection filed. |
| 11/22 | Judgment that the application of the pltff for a permanent injunction restraining deft from suspending service to the pltff's private track is granted filed. JSC |
| 12/17 | Notice of appeal filed. Copy to C of A (LIRR) |
| 12/30 | Bond filed. |
| 1977 | |
| 1/3 | Civil appeal scheduling order filed. |

ORDER TO SHOW CAUSE BY ROSLING, J., DATED NOVEMBER 14, 1972.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Defendant | ) | CIVIL ACTION NO._____ |

ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE
WITH TEMPORARY RESTRAINING ORDER

At a session of said Court held in the Federal District Court House for the Eastern District of New York, on November _____, 1972.

PRESENT: Honorable _____
District Judge

Upon the annexed affidavit of Benson T. Buck and the verified complaint of the Plaintiff in the above-entitled action praying a preliminary order of injunction therein,

ORDER TO SHOW CAUSE BY ROSLING, J., DATED NOVEMBER 14, 1972

together with a temporary restraining order until such time as it may be determined whether the said preliminary order of injunction should issue and the Court being fully informed by counsel in the premises and good and sufficient cause appearing therefor, it is hereby

ORDERED that the Defendant, Long Island Railroad, a corporation of the State of New York, appear before this Court on the 7th day of December, 1972, at 2:15 o'clock in the ~~forenoon~~ afternoon, to show cause why a preliminary order of injunction should not be issued as prayed in said Complaint; and it is further

ORDERED that the Defendant, its officers, agents, servants, employes, attorneys, and representatives, including persons not specifically named herein but who are officers or employes of the Defendant and all other persons in active concert or participation with them or under their direction, show cause at said time and place why they be not restrained as follows:

(1) From interfering in any manner whatsoever with the switch connection from the line of track of Long Island Railroad adjacent to Plaintiff's facility at Bethpage, Long Island from suspending service

ORDER TO SHOW CAUSE BY ROSLING, J., DATED NOVEMBER 14, 1972

over said switch connection from placing said switch out of service, and from interfering by violence, force, intimidation, artifice, stratagem, threats, or in any manner whatsoever, with freight cars destined to or from the premises and buildings of the Plaintiff located at Bethpage, Long Island, New York, and more readily identifiable as the General Motors Parts Division.

(2) From in any way interfering with the access to the aforesaid premises and buildings by the Plaintiff, its employes, agents, representatives, and those having a right thereto, or from interfering with, accosting, or restricting in any way whatsoever the ingress to or egress from the aforesaid premises and buildings by the Plaintiff, its employes, agents, representatives, and those having a right thereto;

(3) From protecting, aiding, abetting, or assisting anyone in the commission of said acts;

ORDER TO SHOW CAUSE BY ROSLING, J., DATED NOVEMBER 14, 1972

(4) From interfering with the ingress or egress from said buildings and premises of trucks, railroad cars, or conveyances of any kind; and it is further

ORDERED that the Defendant, its officers, agents, servants, employes, attorneys, and representatives, including persons not specifically named herein but who are officers or employes of the Defendant and all other persons in active concert or participation with them or under their direction, are temporarily restrained pending the hearing of the motion for preliminary injunction herein as aforesaid:

(1) From interfering in any manner whatsoever with the switch connection from the line of track of Long Island Railroad adjacent to Plaintiff's facility at Bethpage, Long Island from suspending service over said switch connection from placing said switch out of service, and from interfering by violence, force, intimidation, artifice, stratagem, threats, or in any manner whatsoever, with freight cars destined to or from the premises and buildings

ORDER TO SHOW CAUSE BY ROSLING, J., DATED NOVEMBER 14, 1972

of the Plaintiff located at Bethpage, Long Island, New York, and more readily identifiable as the General Motors Parts Division.

(2) From in any way interfering with the access to the aforesaid premises and buildings by the Plaintiff, its employes, agents, representatives, and those having a right thereto, or from interfering with, accosting, or restricting in any way whatsoever the ingress to or egress from the aforesaid premises and buildings by the Plaintiff, its employes, agents, representatives, and those having a right thereto;

(3) From protecting, aiding, abetting, or assisting anyone in the commission of said acts;

(4) From interfering with the ingress or egress from said buildings and premises of trucks, railroad cars, or conveyances of any kind; and it is further

ORDER TO SHOW CAUSE BY ROSLING, J., DATED NOVEMBER 14, 1972

ORDERED that service of a copy hereof on Defendant or ~~his~~ its attorney, ~~on or before~~ _____, ~~1972~~, be deemed good and sufficient service.

Dated: Brooklyn, N.Y.
November 14, 1972

/s/ [illegible]
District Judge

Entered at Brooklyn, N.Y.
this 14th day of November
1972 at 4:50 p.m.

AFFIDAVIT OF BENSON T. BUCK IN SUPPORT OF ORDER TO SHOW CAUSE.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Defendant | CIVIL ACTION NO._____ |

AFFIDAVIT OF BENSON T. BUCK

STATE OF NEW YORK )
)
COUNTY OF NEW YORK )

BENSON T. BUCK, being first duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice before the courts of record of New York State and that he is counsel for General Motors Corporation with offices located at 3044 West Grand Boulevard, Detroit, Michigan 48202.

AFFIDAVIT OF BENSON T. BUCK IN SUPPORT OF ORDER TO SHOW CAUSE

2. That he personally notified Richard H. Stokes, General Attorney, The Long Island Rail Road at Jamaica Station, Jamaica, New York 11435, by telephone at 9:50 a.m. November 14, 1972 that Plaintiff General Motors Corporation will file a complaint in the United States District Court, Eastern District of New York in Kings County at or about 2:00 p.m. of this date seeking a temporary restraining order and preliminary injunction against Defendant The Long Island Rail Road.

Further deponent sayeth not.

Benson T. Buck

Subscribed and sworn to before
me this 14th day of
November, 1972.

JOHN C. THEDE
Notary Public, State of New York
No. 41-[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1973

MOTION FOR TEMPORARY RESTRAINING ORDER.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAILROAD COMPANY<br><br>A Corporation of the State of New York<br><br>Defendant | MOTION FOR TEMPORARY RESTRAINING ORDER ON CONSENT<br><br>CIVIL ACTION NO. 72C 1549 |

Plaintiff moves the Court for a continuance of the Temporary Restraining Order issued by this Court on November 14, 1972, restraining Defendant, its agents, employes and persons acting in concert, from terminating rail freight service to Plaintiff's Parts Distribution Center located in the municipality of Bethpage, Long Island, New York, pending the decision of the Interstate Commerce Commission in a collateral proceeding to be commenced, on the ground that immediate and irreparable injury, loss and damage will result to Plaintiff if Defendant is not restrained, as more fully appears from the Amended Complaint herein and the affidavit of Harold A. Stater attached thereto, and upon the further ground that the parties herein are agreed that the Interstate Commerce Commission is

MOTION FOR TEMPORARY RESTRAINING ORDER

the proper forum to resolve their dispute and Defendant consents to the issuance of the Order prayed for in the form annexed as shown by the endorsement of its counsel below.

Dated:

New York, New York
December 5, 1972.

ROSS L. MALONE
Attorney for Plaintiff
GENERAL MOTORS CORPORATION
767 Fifth Avenue
New York, New York 10022
(212) 486-5086

By s/ J. J. Higgins
J.J. Higgins, Of Counsel

GEORGE M. ONKEN
Attorney for Defendant
THE LONG ISLAND RAILROAD
CORPORATION
Jamaica Station
Jamaica, New York 11435
(212) 526-0900

By s/ Richard H. Stokes
Richard H. Stokes, Of Counsel

TEMPORARY RESTRAINING ORDER ISSUED BY ROSLING, J.,
DATED DECEMBER 7, 1972.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAILROAD COMPANY<br><br>A Corporation of the State of New York<br><br>Defendant | TEMPORARY RESTRAINING ORDER<br><br>CIVIL ACTION NO. 72C 1549 |

This cause came on to be heard pursuant to this Court's Order of November 14, 1972, on plaintiff's motion for a continuance of the restraint contained in the November 14, 1972 Order and the Court having considered the amended verified Complaint and the affidavits submitted in support thereof, having heard counsel for both parties in open court, and counsel for defendant having consented to the entry of this Order, and it appearing to the Court after due deliberation that plaintiff is entitled to injunctive relief, it is

TEMPORARY RESTRAINING ORDER ISSUED BY ROSLING, J., DATED DECEMBER 7, 1972

ORDERED, that, for the period pending the decision of the Interstate Commerce Commission in a collateral proceeding to be commenced by plaintiff and defendant and for a further period of thirty (30) days following receipt of notice of such decision by the parties to this action, defendant, its agents, servants, employes and attorneys and all persons in active concert and participation with it be and they hereby are restrained and enjoined from:

(a) interfering in any manner whatsoever with the switch connecting the line of Defendant's railroad at Bethpage, Long Island, New York, to Plaintiff's Parts Distribution Center facility lying adjacent thereto and interfering by violence, force, intimidation, artifice, stratagem, threats, or in any matter whatsoever, with freight car movements into or out of the premises and buildings of the Plaintiff located at Bethpage, Nassau County, New York, and more readily identifiable as the General Motors Parts Division, Parts Distribution Center.

TEMPORARY RESTRAINING ORDER ISSUED BY ROSLING, J.,
DATED DECEMBER 7, 1972

(b) in any way interfering with the access to the aforesaid premises and buildings by railroad or from interfering with, accosting, or restricting in any way whatsoever the ingress to or egress from the aforesaid premises and buildings by railroad carrier.

(c) protecting, aiding, abetting, or assisting anyone in the commission of said acts; and

(d) interfering with the ingress to or egress from said premises and buildings of trucks, railroad cars or conveyances of any kind.

ORDERED, that any termination of service by defendant to plaintiff occurring as a result of job actions undertaken by employes of defendant belonging to a union engaged in collective bargaining with defendant shall not violate the terms of this injunction; and

ORDERED, that plaintiff and defendant shall submit the dispute herein to the Interstate Commerce Commission for

TEMPORARY RESTRAINING ORDER ISSUED BY ROSLING, J.,
DATED DECEMBER 7, 1972

resolution by filing the appropriate petition within sixty (60) days of the date hereof and plaintiff shall file a copy of such petition with the record herein; and

ORDERED, that the prevailing party in the collateral proceeding before the Interstate Commerce Commission shall bring on an appropriate motion herein within thirty (30) days of the final decision in such proceeding; and

ORDERED, that defendant's time to serve an answer to the Complaint herein is extended to a day ten (10) days prior to the hearing on the above motion; and

ORDERED, that no undertaking need be filed herein, defendant having waived same.

Issued at Brooklyn, New York
this 7th day of December, 1972,
at 2:55 P.M.

s/ George Rosling
U.S.D.J.

AMENDED COMPLAINT.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAILROAD COMPANY<br><br>A Corporation of the State of New York<br><br>Defendant | AMENDED COMPLAINT<br><br>CIVIL ACTION NO. 72C1549 |

NOW COMES General Motors Corporation, a Delaware Corporation, the above-named Plaintiff, by its attorney, Ross L. Malone (Benson T. Buck and John J. Higgins, of Counsel) and represents unto this Court as follows:

I.

Plaintiff is a Delaware Corporation, with principal offices located in Detroit, Michigan, and is duly qualified and licensed to transact business in the State of New York. For business reasons, General Motors Corporation functions through several unincorporated

divisions, one of which is the General Motors Parts Division.

II.

Plaintiff's General Motors Parts Division is, and has been for some time prior to the times referred to in this Complaint, carrying on warehousing, sales and distribution operations on premises which are located within the County of Nassau, State of New York, and in the municipality of Bethpage, Long Island, said premises being known as General Motors Parts Distribution Center. Said Parts Distribution Center is located on a line of Defendant's railroad. An existing switch connects the railroad line to an industry sidetrack.

III.

On said premises Plaintiff receives, warehouses, stores, sells and distributes automotive parts for vehicles manufactured and sold by General Motors Corporation, and otherwise carries on its general business activities pertinent to such operation. The premises contain the major replacement parts warehouse and distribution facility servicing General Motors dealers throughout the metropolitan New York City area and

portions of outlying areas. In excess of two million automobile owners are ultimately dependent on such facility for the availability of replacement parts.

IV.

The Long Island Railroad Company has its principal offices at Jamaica Station, in the City of New York, County of Queens, State of New York. Defendant is a common carrier by rail of freight and, as such, is subject to the provisions of the Interstate Commerce Act, Title 49 U.S.C., §1, et seq., and to regulations issued and promulgated by the Interstate Commerce Commission under its statutory powers.

V.

The Defendant Long Island Railroad Company is now, and has been at all times material to this Complaint, a common carrier of property by railroad, and has been serving Plaintiff's aforementioned operations at Bethpage, Long Island, New York, via a switch connection leading from Defendant's railroad line to a sidetrack located on property of Plaintiff and operated by Plaintiff.

VI.

Plaintiff receives approximately fifteen rail freight cars of auto parts every week at its Parts Dis-

tribution Center at Bethpage moving from various origins in the United States, which shipments have traditionally been transported in rail service.

VII.

That this Court has jurisdiction of the subject matter pursuant to Title 49 U.S.C. § 17(9) and Title 29 U.S.C. § 1336 and § 1398.

VIII.

Defendant participates in and is a party to rates and schedules lawfully on file with the Interstate Commerce Commission thereby holding itself out to transport and deliver automobile parts and accessories to Plaintiff's place of business at Bethpage, Long Island and pursuant to § 1 of the Interstate Commerce Act has provided and maintained the necessary switch connection with Plaintiff's industrial sidetrack at Bethpage, Long Island, New York.

IX.

Defendant is obligated as a common carrier by rail pursuant to the requirement of § 1 of the Interstate Commerce Act to continue delivering rail car

shipments of automobile parts and accessories to Plaintiff's place of business at Bethpage, Long Island, until the rates are permitted to be cancalled or service discontinued in accordance with the requirement of the Interstate Commerce Act.

FIRST CAUSE OF ACTION

X.

Since on or about the 30th day of October, 1972, by letter addressed to Benson T. Buck, Esq., Attorney for General Motors Corporation (Attached to annexed affidavit of Harold A. Stater), Defendant Long Island Railroad Company has threatened to place out of service on November 15, 1972, the switch track connecting sidetrack serving Plaintiff's Parts Distribution Center at Bethpage, Long Island, New York to Defendant's main line, all of which conduct has occurred, is occurring, or will occur within the jurisdiction of this Court.

XI.

Commencing on November 15, 1972 and continuing thereafter the Defendant will cause said switch to be placed out of service and will suspend rail car deliveries in wanton disregard of the required administrative process

and will thereby unlawfully and illegally deprive the Plaintiff, its employes, representatives, agents, and other persons of their statutory right to receive freight service by rail at said premises.

XII.

The threat to place said switch track out of service and suspend freight deliveries over said switch and sidetrack is an abrogation of Defendant's duty as a common carrier to serve all shippers located on its lines of tracks as provided by Section 1, et seq., of the Interstate Commerce Act, Title 49 U.S.C., §1, et seq. requiring Defendant to provide reasonable rates, routes and service to the public and to maintain service in accordance with lawfully published rates unless relieved therefrom by order of the Interstate Commerce Commission.

XIII.

As a result of the illegal and unlawful acts described and set forth in Paragraphs X and XI above, the Plaintiff will be deprived of the right to use that

portion of its property dependent on the rail connection and will be prohibited from conducting its normal business operations, properly conserving its properties, and carrying out necessary and essential activities at the aforesaid premises. As a further result of the Defendant's unlawful acts, more than two million automobile owners will suffer irreparable injury through the disruption of the supply of replacement parts to the repair facilities on which they depend.

XIV.

The Plaintiff further represents, on information and belief, that the Defendant will execute the aforesaid threats, will pursue the aforementioned course of action, will aid, abet, assist, counsel or advise others in a similar course of conduct, will continue to violate Plaintiff's right to be secure in its property and to exercise its statutory right to freight service by rail, and will cause further great and irreparable injury and damage to the business and property of the Plaintiff, unless restricted from doing so by the Order of this Honorable Court.

AMENDED COMPLAINT

XV.

Plaintiff has no adequate or complete remedy at law as the damages and injury are continuous and permanent in character.

XVI.

Plaintiff will suffer delays, shortages, and serious loss of revenue, as shown by the annexed affidavit of Mr. Harold Stater, Director of Traffic for General Motors Parts Division.

XVII.

The continued illegal and unlawful conduct and acts, and threatened course of action, of Defendant and others, have made it impossible for the Plaintiff to protect its rights and has created an emergency of such a grave and serious nature as to require the issuance by this Honorable Court of a Temporary Restraining Order. The Plaintiff will suffer further great and irreparable injury and damage unless this Temporary Restraining Order is issued by this Court as requested.

XVIII.

The Plaintiff's damages and the amount otherwise involved in this proceeding are in excess of $10,000.00.

AMENDED COMPLAINT

SECOND CAUSE OF ACTION

XIX.

Plaintiff realleges all of the allegations of Paragraphs I through XII of this Complaint and incorporates them herein as if more fully set forth.

XX.

The subject matter of this Complaint relates to the enforcement of the Interstate Commerce Act and the administrative regulations issued thereunder, a matter within the primary jurisdiction of the Interstate Commerce Commission pursuant to 49 U.S.C. § 13.

XXI.

Plaintiff intends to pursue its administrative remedy by expeditiously filing a complaint with the Interstate Commerce Commission seeking a full resolution of its dispute with defendant. The issuance of a temporary restraint by this Court is necessary to preserve the status quo and save plaintiff from irreparable injury pending the decision of the Interstate Commerce Commission.

XXII.

The issuance of a temporary restraint pending the decision of the Interstate Commerce Commission in a

collateral proceeding will result in a saving of this Court's time and resources and the most rapid and effacious resolution of the dispute between Plaintiff and Defendant.

WHEREFORE, Plaintiff, having no adequate legal remedy, prays;

(1) For a Preliminary Injunction in the above-entitled action, restraining and enjoining the Defendant, its servants, employes and attorneys, including persons not specifically named herein but who are members and employes of the Defendant Long Island Railroad Company, and all other persons acting with them or under their direction during the pendency of this action and until the decision of the Interstate Commerce Commission in any collateral proceeding, from:

(a) interfering in any manner whatsoever with the switch connecting the line of

AMENDED COMPLAINT

Defendant's railroad at Bethpage, Long Island, New York, to Plaintiff's Parts Distribution Center facility lying adjacent thereto and interfering by violence, force, intimidation, artifice, stratagem, threats, or in any manner whatsoever, with freight car movements into or out of the premises and buildings of the Plaintiff located at Bethpage, Nassau County, New York, and more readily identifiable as the General Motors Parts Division, Parts Distribution Center.

(b) In any way interfering with the access to the aforesaid premises and buildings by railroad or from interfering with, accosting, or restricting in any way whatsoever the ingress to or egress from the aforesaid premises and buildings by railroad carrier.

(c) protecting, aiding, abetting, or assisting anyone in the commission of said acts;

(d) interfering with the ingress to or egress from said premises and building of trucks, railroad cars or conveyances of any kind.

(2) For an Order temporarily restraining and enjoining all such action on the part of Defendant, its servants, employes and attorneys, including persons not specifically named herein but who are associated with said Defendant railroad, and all other persons acting with them or under their direction pending the hearing on whether or not the Preliminary Order should be entered and the ultimate decision of the Interstate Commerce Commission;

(3) That the Order of this Court be entered directing the Defendants and each of them to appear before this Court on a date and at a time to be determined by this Court and to show cause why they should not be enjoined and restrained as aforesaid and why the Restraining Order should not be made a Preliminary Injunction;

AMENDED COMPLAINT

(4) That upon final hearing, the judgment of Injunction be made permanent; and

(5) That the Plaintiff be granted such other and further relief as may be just and equitable.

DATED:
NEW YORK, NEW YORK
DECEMBER 5, 1972

Ross L. Malone

ROSS L. MALONE
Attorney for Plaintiff
GENERAL MOTORS CORPORATION
767 Fifth Avenue
New York, New York 10022

Of Counsel:

Benson T. Buck
John J. Higgins

(Verified by George W. Coombe, Jr., December 5, 1972.)

AFFIDAVIT OF HAROLD A. STATER IN SUPPORT OF AMENDED COMPLAINT.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Defendant | CIVIL ACTION NO. 72C 1544 |

AFFIDAVIT OF HAROLD A. STATER

STATE OF NEW YORK )
)
COUNTY OF NEW YORK )

HAROLD A. STATER, being first duly sworn, deposes and says:

1. That he is employed by General Motors Corporation as Director of Traffic, General Motors Parts Division, and that his office address is 6060 W. Bristol Road, Flint, Michigan 48554.

AFFIDAVIT OF HAROLD A. STATER IN SUPPORT OF AMENDED COMPLAINT

2. That General Motors Corporation, a Delaware Corporation with principal offices at Detroit, Michigan, is engaged primarily in the production of motor vehicles and automotive parts at various locations throughout the United States.

3. That General Motors Parts Division is responsible for distributing automotive replacement parts to franchised General Motors automobile dealers; that automotive replacement parts are the items necessary to repair vehicles of General Motors customers and that the total line of automotive replacement parts maintained by the Parts Division approximates 300,000 different items.

4. That General Motors Parts Division maintains warehousing operations which are referred to as Parts Distribution Centers from which the automobile dealers are supplied replacement parts and accessories and that these Parts Distribution Centers are located throughout the United States, including a Parts Distribution Center at Bethpage, Long Island, New York.

AFFIDAVIT OF HAROLD A. STATER IN SUPPORT OF AMENDED COMPLAINT

5. That as Director of Traffic of General Motors Parts Division, he is responsible for meeting the transportation needs of that Division so that the automotive parts freight will be moved to the Parts Distribution Centers in sufficient quantities to maintain adequate inventories, and he is also responsible for arranging the necessary transportation of the parts freight from the Distribution Center to the dealer's place of business.

6. That the Bethpage Distribution Center was built by General Motors Corporation in 1965, adjacent to the main line of the Long Island Railroad, and is served by the Long Island Railroad through a private industrial sidetrack which connects with the main line of the Long Island Railroad through a switch connection.

7. That the private industrial sidetrack serving the Parts Distribution Center is owned and maintained by General Motors Corporation, and another party not here relevant and is located on private property; that the switch connection connecting the tracks of the railroad with the industrial sidetracks is owned by the railroad and located entirely on railroad property.

AFFIDAVIT OF HAROLD A. STATER IN SUPPORT OF AMENDED COMPLAINT

8. That the Bethpage Distribution Center was located adjacent to the Long Island Railroad because rail service is necessary to the operation of that facility. That automotive replacement parts and accessories are received in rail carload quantities from various points of origin outside New York State approximating three rail carloads daily.

9. That the rail carloads are switched into the Parts Distribution Center over the private industrial sidetrack by engines and crews of the Long Island Railroad to the regular unloading docks adjacent to the Parts Distribution Center in accordance with line haul freight rates published in tariffs filed with the Interstate Commerce Commission, tariffs to which the Long Island Railroad is a party and a concurring line of railroad.

10. That the line haul rail rates on which the automotive replacement parts traffic moves to the Bethpage Parts Distribution Center entitles each rail carload to be delivered by the Long Island Railroad to the usual place of unloading which is the unloading dock in the Parts Distribution Center.

AFFIDAVIT OF HAROLD A. STATER IN SUPPORT OF AMENDED COMPLAINT

11. That when the Bethpage Parts Distribution Center was built, it was designed to receive most of the inbound freight by railroad at the unloading docks; that the operation at the Distribution Center is so conducted that the largest volume of freight must be received by rail in order to maintain the inventory of parts required to adequately meet customer demands; and the Bethpage Center is not equipped to receive corresponding volumes of freight by other means of transportation.

12. That the Long Island Railroad has threatened to close the switch connection cancelling all service and deliveries of freight to the Bethpage Distribution Center by November 15, 1972 unless General Motors executes an industrial sidetrack agreement dictated by the Railroad prior thereto. Attached hereto are true copies of letters from the Chief Engineer and counsel for the Long Island advising that service will be discontinued unless General Motors accedes to the Railroad's terms.

13. That General Motors Corporation cannot agree and is under no legal obligation to agree to certain terms of the sidetrack agreement as imposed by the Long Island

Railroad requiring that General Motors incur the expense of maintaining the track and switch connection owned by the Long Island and located on its main line and right-of-way.

14. That if the Long Island discontinues service as threatened, the operation of the Bethpage Parts Distribution Center would be severely curtailed, requiring reduction of personnel and a loss of business which could not be recovered, for it would not be physically possible to supply this facility by another means of transportation with the volume of freight moved by rail which is required to maintain the inventory necessary to meet customer demands.

15. That the Bethpage Parts Distribution Center serves automobile dealers on Long Island, the three western counties of Connecticut and the eastern counties of New York from New York City to the Canadian border, and it would not be possible to shift the source of these dealers' supplies to other Distribution Centers so as to adequately meet dealer needs and fulfill orders for customers' vehicles awaiting repair.

16. That suspension of rail deliveries by the Long Island Railroad to the Bethpage Parts Distribution

AFFIDAVIT OF HAROLD A. STATER IN SUPPORT OF AMENDED COMPLAINT

Center would cause irreparable injury to General Motors Parts Division by prohibiting it from maintaining an adequate supply of parts essential to meet the demands of our dealers and customers thereby resulting in loss of customer confidence and satisfaction.

Further deponent sayeth not.

Harold A. Stater

Subscribed and sworn to before
me this 14th day of
November, 1972.

JOHN C. THEDE
Notary Public, State of New York
[illegible] County
Commission Expires March 30, 1973

LETTER, DATED SEPTEMBER 28, 1972, ANNEXED TO AFFIDAVIT OF HAROLD A. STATER.

Chairman William J. Ronan
Lawrence R. Bailey
Leonard Brown
William L. Butcher
Donald H. Elliott
Justin N. Feldman
Harold L. Fisher
Mortimer J. Gleason
Frederic B. Powers
Eben W. Pyne
William A. Shea

The Long Island Rail Road

Jamaica Station Jamaica, New York 11435 Phone 212 JAmaica 6 0900

September 28, 1972

Mr. George G. Matthes
Argonaut Division of General Motors
224 West 57th Street
New York, N. Y. 10019

Dear Mr. Matthes:

As you are aware, we are regularly placing cars on the sidetrack serving your warehouse at Bethpage, New York, without the benefit of an agreement covering the maintenance, liability, and operation of the track.

In order to eliminate the possibility of costly litigation resulting from any number of causes, we must insist that the agreement be executed and returned to this office.

If the executed agreement has not been received by this office on or before November 1, 1972, the track will be placed out of service and freight deliveries suspended.

Very truly yours,

J. D. Woodward
Chief Engineer

TO:kil

OCT 5 - 1972

LETTER, DATED OCTOBER 30, 1972, ANNEXED TO AFFIDAVIT OF HAROLD A. STATER.

Chairman William J. Ronan
Lawrence R. Bailey
Leonard Braun
William L. Butcher
Donald H. Elliott
Justin N. Feldman
Harold L. Fisher
Mortimer J. Gleason
Frederic B. Powers
Eben W. Pyne
William A. Shea

The Long Island Rail Road

Jamaica Station Jamaica, New York 11435 Phone 212 [illegible]

George M. Onken
Vice President, General Counsel and Secretary

GENERAL COUNSEL
NOV 2 '72
FORDERSTIME HARTWIG
SEGAL
WILLIAMS
GUDAT
THOMAS
MARZ
ANSELL
BEVILES
DUNN
CLAYTON ZALESKI
CROWLEY LIBRARY
FURTHER ATTENTION OF:

October 30, 1972

Benson T. Buck, Esq.
General Motors Corporation
General Motors Building
3044 West Grand Boulevard
Detroit, Michigan 48202

Dear Ben:

Please excuse my delay in not replying earlier to your letter of October 10, 1972. However, the labor difficulties that we have experienced on this property during the last two weeks have precluded my giving attention to any other matters.

Your outline of the position of General Motors has been thoroughly considered and while I am inclined to agree in regard to the fire damage liability clause, I cannot agree with you in regard to the cost of maintaining the switch connection.

As I indicated to you when you were here in my office on October 3rd, the extreme deficits from freight service have forced this Company to take the position that as a reasonable requirement for maintenance of a siding connection, we will require industry to assume the maintenance cost from point of switch rather than from the property line. This position is being taken and maintained uniformly in regard to all industries on our line and we do not feel there is any justification for making an exception for your company.

Because of the delay in replying to you, I have had the deadline for placing the track out of service extended to November 15, 1972, but unless I receive an executed agreement prior to that date, we will be

LETTER, DATED OCTOBER 30, 1972, ANNEXED TO AFFIDAVIT OF HAROLD A. STATER

forced to place the track out of service and suspend freight deliveries thereafter. As I indicated above, this Company is amenable to revising the fire liability clause so as to delete the phrase "regardless of" and insert in place thereof the phrase "unless due to."

Sincerely yours,

rhs:dn

Richard H. Stokes
General Attorney

ORDER OF ROSLING, J., DATED FEBRUARY 16, 1973.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

Filed
Feb 20, 1973
Clerk's Office
U.S.D.C. E.D.N.Y

GENERAL MOTORS CORPORATION, a Corporation of the State of Delaware,

Plaintiff,

-against-

THE LONG ISLAND RAILROAD COMPANY, a Corporation of the State of New York,

Defendant.

----------x

ORDER

CIVIL ACTION NO.
72 C 1549

This Court having issued an Order in this proceeding under date of December 7, 1972 directing, among other things, that the plaintiff and defendant shall submit the dispute herein to the Interstate Commerce Commission for resolution by filing an appropriate petition within sixty (60) days of the date hereof; and

It appearing that the parties hereto were unable to complete and file such appropriate petition within the sixty-day period specified in this Court's Order of December 7, 1972; and

It appearing that both plaintiff and defendant have requested this Court to extend the period within which an appropriate petition may be submitted to the Interstate Commerce Commission by thirty (30) days, it is

ORDERED, that the plaintiff and defendant herein shall have up to and including March 5, 1973 to file an appropriate petition to the Interstate Commerce Commission for resolution of the dispute herein.

CONSENTED TO:

s/ Day S. Malone by P.H.S.
Attorney for General Motors Corporation

s/ George Rosling
U.S.D.J.

s/ Georgeville Corbin
Attorney for the Long Island Rail Road Company

Dated: Brooklyn, N.Y.
Feb 16, 1973

A TRUE COPY ATTEST
LEWIS ORGAN

JOINT PETITION FOR DECLARATORY ORDER.
BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | | |
|---|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Petitioner<br><br>v.<br><br>THE LONG ISLAND RAILROAD<br><br>A Corporation of the State of New York<br><br>Respondent | ) | DOCKET NO. _____ |

JOINT PETITION FOR DECLARATORY ORDER

The Petitioner, General Motors Corporation, and Respondent, The Long Island Railroad, respectfully allege as follows:

1. This is a joint petition for declaratory order pursuant to the authority contained in Section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554(e), for the purpose of determining questions in active and actual controversy between Petitioner General Motors Corporation (hereinafter sometimes referred to as "Petitioner" or "General Motors"), and Respondent Long Island Railroad

(hereinafter sometimes referred to as "Respondent" or "The Long Island"), and to settle an existing controversy concerning various issues within the primary jurisdiction of the Interstate Commerce Commission arising from the case of General Motors Corporation v. The Long Island Railroad, Civil Action No. 72 C 1549, United States District Court for the Eastern District of New York. By order dated December 7, 1972, the District Court referred to this Commission certain issues arising out of the suit. The Court's order is attached hereto as Appendix A.

2. The issues raised by the present petition relate to matters arising under §1 et seq., of the Interstate Commerce Act, including the provisions of §1(9) of the Act, 49 U.S.C. §1(9), as set forth infra.

3. Petitioner is a Delaware Corporation, with principal offices located in Detroit, Michigan, and is duly qualified and licensed to transact business in the State of New York. For business reasons, General Motors functions through several unincorporated divisions, one of which is the General Motors Parts Division.

4. Petitioner's General Motors Parts Division is, and has been for some time prior to the times referred to in this Petition, carrying on warehousing, sales and distribution operations on premises which are located within the County of Nassau, State of New York, and in the municipality of Bethpage, Long Island, said premises being known as General Motors Parts Distribution Center. Said Parts Distribution Center is located on a line of Respondent's railroad. An existing switch connects the railroad line to an industry sidetrack.

5. On said premises Petitioner receives, warehouses, stores, sells and distributes automotive parts for vehicles manufactured and sold by General Motors Corporation, and otherwise carries on its general business activities pertinent to such operation. The great bulk of inbound freight is delivered by Respondent. The premises contain a major replacement parts warehouse and distribution facility servicing General Motors dealers throughout the metropolitan New York City area and portions of outlying areas.

6. The Long Island Railroad Company has its principal offices at Jamaica Station, in the City of

New York, County of Queens, State of New York. Respondent is a common carrier by rail of freight and, as such, is subject to the provisions of the Interstate Commerce Act, Title 49 U.S.C. §1, et seq., and to regulations issued and promulgated by the Interstate Commerce Commission under its statutory powers.

7. Respondent is now, and has been at all times material to this Petition, a common carrier of property by railroad, and has been serving Petitioner's aforementioned operations at Bethpage, Long Island, New York, via a switch connection leading from Respondent's railroad line to a sidetrack located on property of Petitioner and operated by Petitioner. Although the parties hereto have not yet agreed between themselves as to what constitutes "reasonable terms" basically the connection was established in accordance with the terms of Section 1(9) of the Interstate Commerce Act, which reads as follows:

> "(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where

> such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

8. Petitioner normally receives approximately five to ten rail freight cars of auto parts every week at its Parts Distribution Center at Bethpage moving from various origins in the United States. These shipments have traditionally been transported in rail service.

9. Respondent participates in and is a party to rates and schedules lawfully on file with the Interstate Commerce Commission and Petitioner contends that

Respondent thereby holds itself out to transport and deliver automobile parts and accessories to Petitioner's place of business at Bethpage, Long Island, at its published rates and no other, pursuant to the Interstate Commerce Act. In accordance with §1 of said Act, Respondent has heretofore provided and maintained the necessary switch connection with Petitioner's industrial sidetrack at Bethpage, Long Island, New York, although because of the dispute between Petitioner and Respondent as to what constitutes "reasonable terms", no formal agreement covering the maintenance and operation of the sidetrack has as yet been executed.

10. Petitioner contends Respondent is obligated as a common carrier by rail under terms of §1 of the Interstate Commerce Act to continue delivering rail car shipments of automobile parts and accessories to Petitioner's place of business at Bethpage, Long Island, until the rates published by Respondent are permitted to be canceled or service discontinued in accordance with the requirements of the Interstate Commerce Act. Until now, Respondent has done so, despite the refusal of Petitioner to execute the standard sidetrack agreement offered by Respondent to all industries

on its line of railroad having private sidings as a result of their disagreement as to what constitutes "reasonable terms" within the meaning of §1(9) of the Act. Because of Petitioner's refusal to execute such an agreement, Respondent has threatened to suspend service over the existing switch connection, which would terminate freight service to the Parts Distribution Center. The aforesaid agreement which Petitioner refuses to sign contains a clause requiring Petitioner to assume the cost of maintenance of the entire sidetrack including the track and switch connection physically located upon Respondent's right-of-way. Petitioner contends that this is an unreasonable condition which is considered unlawful and seeks the redress of this Commission.

11. On or about the 30th day of October, 1972, by letter addressed to General Motors Corporation, Respondent Long Island Railroad Company threatened to place out of service on November 15, 1972, the switch track connecting the sidetrack which serves Petitioner's Parts Distribution Center at Bethpage, Long Island, New York and the main line of Respondent, unless Petitioner executed a sidetrack agreement with Respondent which would, among other things, obligate Petitioner to maintain the switch

connection, tracks, and other facilities owned by Respondent and located entirely on Respondent's right-of-way. This, Petitioner refused to do.

12. The action, threatened by Respondent, would cause said switch to be placed out of service and would suspend rail car deliveries at such private siding requiring such shipments to be received at Respondent's team track facility located at Hicksville, approximately three railroad miles distant, an action which Petitioner contends would thereby unlawfully and illegally deprive Petitioner of its statutory right to receive freight service by rail at said premises pursuant to Section 1(9) of the Interstate Commerce Act (49 U.S.C. §1(9)). Further, Petitioner believes that the threatened action would constitute an abrogation of Respondent's duty as a common carrier to serve all shippers located on its lines of tracks as provided by Section 1, et seq., of the Interstate Commerce Act, Title 49 U.S.C., §1 et seq., requiring Respondent to provide reasonable rates, routes and service to the public and to maintain service in accordance with lawfully published rates unless relieved therefrom by order of the Interstate Commerce Commission.

JOINT PETITION FOR DECLARATORY ORDER

13. Respondent contends it is not obligated to continue serving the private siding of Respondent, if Petitioner refuses to execute the standard sidetrack agreement tendered it by Respondent.

14. This disagreement between Respondent and Petitioner raises the issue of whether a railroad may require the industries located upon its line of railroad to be responsible for the maintenance of the entire private siding serving it, including the owned portion of the track and switch connection located on railroad's right-of-way. Petitioner is willing to maintain and does maintain all track lying upon its own property but believes maintenance of track located on Respondent's right-of-way to be an onerous and unreasonable act; Petitioner believes that to accede to Respondent's demand would constitute a violation of Section 6(1) of the Act (49 U.S.C. §6(1)) which provides in part:

> "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any

> other carrier by railroad...The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require..." [Emphasis supplied]

The charge at issue here is not reflected anywhere in the tariffs of Respondent, and Petitioner believes it is an operating cost properly chargeable to and incurred by Respondent in discharging its duty as a common carrier. Respondent contends that the charge in issue herein is a cost properly attributable to the maintenance of the private siding and is a "reasonable term" within the meaning of §1(9) of the Act.

15. Petitioner has been, is, and continues to be willing to execute a sidetrack agreement with reasonable terms mutually beneficial to both parties, as determined by the Commission in this proceeding. Respondent, upon determination by the Commission of reasonable terms, will, of course, live up to its common carrier obligations.

16. Respondent, considers the prepared sidetrack agreement lawful and reasonable in all respects and alleges

that it is similar to those executed by all other freight patrons located on its line of railroad. Further, it contends that it is entitled under §1(9) to require industries to assume the cost of maintaining the entire private siding serving its place of business.

17. If Respondent is permitted to suspend service over the switch, Petitioner contends it will suffer delays, shortages, and serious loss of revenue, but if Respondent is required to maintain the switch connection and portions of the private sidetrack located on its right-of-way, it will be subsidizing Petitioner's operations and business since its current freight revenues are inadequate to cover the costs of its freight service.

18. The subject matter of this Petition relates to the enforcement of the Interstate Commerce Act and the administrative regulations issued thereunder, a matter within the primary jurisdiction of the Interstate Commerce Commission pursuant to 49 U.S.C. §13.

WHEREFORE, Petitioner and Respondent pray that this Commission enter an order instituting an investigation (1) determining the proper rule applicable to the private sidetrack involved

in this action, (2) determining what constitutes "reasonable terms" for the maintenance and operation of a private siding within the meaning of §1(9) of the Act, (3) making such further findings as the Commission may deem advisable, and (4) issuing an order terminating this controversy, in accordance with the authority vested in it by Section 5(d) of the Administrative Procedure Act, 5 U.S.C. §554(e), and that a certified copy of its report and order be submitted to the United States District Court for the Eastern District of New York.

The action herein requrested of the Commission is not one that will produce any significant impact on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Respectfully submitted,

/s/ BTB

Benson T. Buck
Attorney for Petitioner
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Richard H. Stokes
General Attorney
The Long Island Railroad Company
Jamaica Station
Jamaica, New York 11435

February , 1973

OPENING STATEMENT OF FACTS AND ARGUMENT OF
THE LONG ISLAND RAIL ROAD COMPANY.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

Docket No. 35790

JOINT PETITION FOR DECLARATORY ORDER -
PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION
AND THE LONG ISLAND RAILROAD COMPANY

---

OPENING STATEMENT OF FACTS
AND ARGUMENT OF :

THE LONG ISLAND RAIL ROAD COMPANY

---

## I. INTRODUCTION

By joint petition, The Long Island Rail Road Company (hereinafter "LIRR") and General Motors Corporation (hereinafter "GMC") seek a declaratory finding in regard to Section 1 (9) of the Interstate Commerce Act as to whether or not it is reasonable under all the circumstances pertaining for the LIRR to require GMC to bear the entire expense of maintaining a private switch connection and private siding even though portions thereof are physically located upon the LIRR's property and right-of-way.

Subsidiary to the foregoing issue, is the question of whether or not the LIRR has the right to refuse to serve such private siding if GMC refuses to execute the standard sidetrack agreement tendered it by LIRR.

It is the LIRR's contention that GMC, in common with other shippers and receivers of freight having private sidings on LIRR's line of

railroad, in the face of LIRR's freight deficits, the additional expense to LIRR of serving such private sidings, and the benefits accruing to such industries from having such private siding service, should reasonably be required to bear the entire expense of maintaining such private siding and switch connection even though a portion thereof is located upon LIRR property.

In this connection, LIRR denies the allegations or inferences of GMC contained in paragraphs 9, 10 and 12 of the joint petition that the line haul rates on freight traffic encompass the maintenance cost of the switch connection and private siding trackage located upon LIRR's right-of-way.

## II. STATEMENT OF FACTS

1. LIRR is a Class I common carrier by railroad transporting freight and passengers in interstate and intrastate commerce. LIRR operates and has lines of railroad in the Counties of Suffolk, Nassau, Queens, Kings and New York, all in the State of New York. It maintains interchange connections with other common carriers by rail at Long Island City and Fresh Pond Junction for the interstate transportation of freight shipments to and from points on Long Island.

2. Within the Bethpage area, GMC maintains a building presently serviced by a switch connection and private siding located on the eastbound track of LIRR's main line with a facing point switch. The private sidings at Bethpage are under the jurisdiction of the district freight agent at Hicksville (2 miles distant) where a modern public team track facility with a capacity of 25 freight cars is maintained. At Farmingdale, about 2 miles eastward from Bethpage, the LIRR maintains an older and smaller public team track

facility with a capacity of 8 freight cars and which is under the jurisdiction of the district freight agent at Brentwood.

3. GMC's private sidetrack and switch connection were put into service in late 1965 and even though its predecessor in interest signed LIRR's standard sidetrack agreement, GMC has steadfastly refused to enter into the standard private sidetrack agreement tendered it by LIRR, a copy of which is annexed hereto as Exhibit A. As a result of GMC's refusal to execute the standard private sidetrack agreement, LIRR served notice that on and after November 15, 1972, the GMC sidetrack would be placed out of service.

4. GMC's private siding receives daily service, Monday through Friday and according to the records of LIRR, the traffic volume on this private siding since it was put into service in late 1965, is as follows:

| Year | No. of cars |
|---|---|
| 1965 | 88 |
| 1966 | 378 |
| 1967 | 521 |
| 1968 | 509 |
| 1969 | 538 |
| 1970 | 454 |
| 1971 | 541 |
| 1972 | 585 |

During the past five years, as shown by the above figures, the average weekly volume of freight cars received on the GMC siding has varied from 8 to 11 cars.

5. As shown by the verified statement of Nicholas C. LaRocco annexed hereto as Exhibit B, the average annual maintenance for the GMC switch connection and private siding is $3,266.80.

6. As shown by the verified statement of Donald M. Kadel annexed hereto as Exhibit C, the estimated additional cost of serving the GMC private siding at Bethpage, where cars must be respotted, is $10.40 per car when compared with placing the same cars at the modern Hicksville team track facility. Even if no respotting of cars is required on either siding, the additional cost would still amount to $4.46 per car when compared with comparable moves at the Hicksville team track facility.

7. Based upon the average annual cost of maintaining the GMC switch connection and private siding trackage located upon LIRR property and the additional operating costs of serving that siding as compared to service at the team track facility, the cost per car over and beyond the LIRR's interchange and line haul costs amount to $15.98 per car if respotting is required and $10.04 per car if no respotting is required. Based upon the 20,000 lb. billing weight of the GMC cars, these figures translate to $0.08 per cwt. and $0.05 per cwt. respectively.

8. As shown by the aforementioned verified statement of Nicholas C. LaRocco annexed hereto as Exhibit B, prior to 1954 the practice of the LIRR was to require industries with private sidings to bear the entire cost of maintenance of the private sidetrack and switch connection regardless of whether it was on LIRR property or not. During the post World War II period through the 1960's, this practice changed in order to try to meet competition from other modes of carriage, particularly motor carriers. Since 1970, as a result of the tremendous and increasing deficits

incurred in LIRR freight service, this policy was changed and LIRR reverted back to its original practice of requiring industries to bear the entire cost of their private sidings. Besides all new sidetrack agreements being in the form tendered to GMC (see Exhibit A annexed hereto), all outstanding private sidetrack agreements having contrary clauses are being canceled and the Exhibit A form substituted therefor. As shown in Mr. LaRocco's verified statement (Exhibit B) 169 private sidings out of a total of 278 or almost 60 percent are now covered by this type of agreement.

9. The LIRR has sought to eliminate or minimize the problem of its deficits from freight service in a number of ways as shown by the verified statement of James L. Faraci annexed hereto as Exhibit D. It has sought a revision of its division of the freight revenues from interline shipments in ICC Docket 35153. The Report and Recommended Order of the Hearing Examiner served under date of September 24, 1971, and as modified by Decision and Order of The Commission, Division served April 23, 1973, would produce today approximately $1,400,000 in additional revenues to LIRR or roughly 14 percent of its deficit leaving LIRR with a deficit of $10,000,000 per year. Of course, a petition for reconsideration was filed by the other railroads which because of the modification by Division 2 of the Hearing Examiner's Report and Order, has prevented the matter from becoming administratively final and also prevented LIRR from obtaining any additional revenue. The general freight rate increases, X-259, X-262, X-267 and X-281, have not helped LIRR at all. In this respect, because of the

regressive, adverse effect finally recognized by the ICC and the other carriers, it should be noted LIRR has sought to flag out all of the general freight rate increases beginning with X-265 but has been unsuccessful because of the concerted efforts of the other carriers in violation of § 5(a) of the Act apparently condoned by the ICC. In the latest general increase, X-295, the LIRR's flagout has finally been recognized and it is hoped that the resulting improvement in its competitive situation will result in increased revenues and a consequent decrease in its deficit, however little and late.

10. As is shown by the verified statement of John E. Cremmins annexed hereto and made a part hereof as Exhibit E, the LIRR has during the past 6 years sustained substantial deficits from its freight operations. As stated in its Railroad Annual Report Form A, the deficit in 1972 was $11,461,373, an increase of $6,592,956 over the deficit reported in 1966. In this connection, it should be noted that LIRR's total freight railway operating revenues in 1966 were $9,379,435 as opposed to $9,189,857 in 1972, a 2 percent decrease, even though freight rates on a compounded basis increased well over 35 percent during the same period.

11. As indicated by the verified statement of Joseph J. Remington annexed hereto and made a part hereof as Exhibit F, the GMC traffic from origins in Martinsburg, West Virginia to Bethpage is a deficit proposition whether considered on a variable cost basis or a fully allocated cost basis. While the traffic from Michigan and Ohio origins to Bethpage is, on the basis of territorial costs, marginally profitable, the fact is that territorial costs are not typical of LIRR costs and actually all GMC traffic is handled

at a loss by LIRR. Parenthetically, it should be noted that the territorial costs undoubtedly are not representative of the true costs of the hopelessly bankrupt Penn Central so that Penn Central is almost surely suffering a financial loss in the handling of this traffic.

OPENING STATEMENT OF FACTS AND ARGUMENT OF
THE LONG ISLAND RAIL ROAD COMPANY

## III. ARGUMENT

The fundamental issue before this Commission is whether or not, under all of the facts pertaining to the situation, it is an unreasonable condition for the LIRR to require GMC, a multi-billion dollar corporation receiving extra benefits from private siding service, to bear the full cost of maintaining such private siding and switch connection when the LIRR is suffering staggering deficits from its freight operations and incurs additional costs in serving such private siding.

### A. HISTORICAL PRACTICE ON THE LIRR

Regardless of what policies have been followed on other railroads, particularly those subject to the pressures of large corporations who are able to divert substantial amounts of competitive traffic, prior to 1954 the uniform practice on the LIRR was to require industries with private sidings to bear the entire cost of maintenance for the switch connection and trackage of the siding even though portions of it were located upon railroad owned or leased property. (See Exhibit B). In 1954 because of the growing competition from other modes of carriage and the desire to attract additional industry to the Long Island area, this practice was changed and LIRR undertook for the first time to absorb the cost of maintaining the switch connections and portions of private siding trackage located upon LIRR trackage. In this connection, it should be noted that LIRR's Rail Form A for 1954, showed a profit of $2,631,025 from freight operations. By the end of 1970, as reported in Rail Form A, LIRR's freight operations were reporting a deficit of $9,567,852

on total freight railway operating revenues of $10,406,787. (See Exhibit E).

At this point, the LIRR called a halt to its 1954 policy of subsidizing private industry and besides requiring all new industries locating on its line to bear the full costs of installing and maintaining their sidings, the LIRR began to renegotiate all outstanding sidetrack agreements to have them conform to this reinstated policy. As of today, approximately 60 percent of the agreements have been so converted and it is expected that all outstanding agreements will be so modified by the end of 1974.

Thus, it cannot be argued that this requirement of the LIRR is new or innovative. Except for the brief 16 year period between 1954 and 1970, it has been the standard sidetrack practice of the LIRR throughout its history and the LIRR's financial needs mandated the restoration of this policy in 1970.

## B. THE INTERSTATE COMMERCE ACT DOES NOT PROHIBIT A RAILROAD FROM REQUIRING AN INDUSTRY TO BEAR THE FULL COST OF MAINTENANCE OF ITS PRIVATE SIDING.

Section 1(9) of the Interstate Commerce Act, in pertinent part, states:

> "Any common carrier .... upon application .... shall construct, maintain, and operate upon reasonable terms a switch connection with any .... private side track which may be constructed to connect with its railroad .... where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same ...." (emphasis added)

Section 1(9) of the Act goes on to state in pertinent part:

OPENING STATEMENT OF FACTS AND ARGUMENT OF
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> "If any common carrier shall fail to .... operate any such switch or connection as aforesaid .... such shipper .... may make complaint to the Commission .... and the Commission .... shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor ...."
> (emphasis added)

Thus, by the use of the language "upon reasonable terms", "sufficient business to justify the maintenance of the same", and "reasonable compensation therefor", it is clear that the Congress did not intend by the enactment of Section 1(9) to require the carrier in each and every case to bear the entire cost of constructing and maintaining a private siding switch connection. In view of the language "which may be constructed to connect with its railroad", the Congress clearly contemplated that the portion of the sidetrack constructed off railroad property was the responsibility of the industry.

In regard to the switch connection on railroad property, in the event the parties were unable to agree, the Congress clearly intended the Commission to decide in the light of the facts of each individual situation whether it was more reasonable for the industry or the railroad to bear the cost of constructing and maintaining a switch connection located upon a railroad right-of-way. Among the factors the Congress intended the Commission to consider in making its determination as to "justification and reasonable compensation therefor" was whether there was sufficient business to justify the maintenance of the sidetrack.

In any reasonable consideration of this latter question, the Commission must, of course, consider not only the volume of cars being handled or

proposed to be handled upon the sidetrack but also whether or not this traffic produces revenue to the carrier upon whose line the sidetrack is located sufficient to justify that carrier absorbing the maintenance costs.

In the case of the GMC sidetrack at Bethpage, not only does LIRR contend that it does not derive sufficient revenue from the GMC traffic to justify maintaining the sidetrack, but when analyzed on the basis of territorial costs, the revenue produced by such traffic is of such a marginal level -- some even of a deficit level -- that it is scarcely worthwhile handling at all even if GMC were to pay the full cost of maintenance. However, if one views the territorial costs in their true light of understating the actual costs of the deficit-ridden LIRR freight operations, then it is clear that the GMC traffic to Bethpage does not cover its costs of operations and it would be highly inequitable and unreasonable to require LIRR to further subsidize the operations of a multi-billion dollar profitable corporation such as GMC by absorbing any of the cost of their private sidetrack whether on railroad property or not.

Further, in viewing Mr. Remmington's cost analysis, it should be recognized that the territorial averages used are based upon 1970 costs whereas the freight rate levels compared with the costs are 1973 levels.[1] Thus, the territorial averages do not take into account the cost rises of 1971, 1972 and 1973 which caused the railroad industry to obtain approximately

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1. The general freight rate increases of X-295 did not apply on traffic to or from LIRR and therefore it cannot be argued or said that these freight rates were increased subsequent to June, 1973.

20 percent higher freight rates on a compounded basis.[2]

Thus, where the traffic itself is marginal, at best, when considered in the light most favorable to the shipper and definitely deficit producing when viewed in the light of the carrier's financial records and operations, it is not unreasonable to expect the industry to assume the full cost of its own private siding.

As was indicated above, Section 1(9) of the Act clearly contemplated that a carrier may make a reasonable charge to an industry for the maintenance of a private siding switch connection located on railroad property. Further, such a reasonable charge is not a charge for transportation and need not be set forth in any tariff since it is a contract charge in the nature of rent. The Commission, Division 3, itself, so held in Merchants Refrigerating Co. v. N.Y. Central RR, 238 ICC 599 (1940). In this case, Commissioner Mahaffie in the opinion of the Commission said at page 604:

> "This is an arrangement to connect defendant's line with complainant's private siding, and to provide for the continuance and upkeep of the spur track. It is not a contract for transportation itself, or for the movement of particular shipments. The rent is payable event if no shipments are made. **** Section 6 of the act does not require the publication in tariff form of the terms upon which a switch connection is to be built and operated.
>
> "We find that the collection of the rent in addition to freight charges based on defendant's tariff rates to and from complainant's warehouse does not represent an overcharge, nor result in unreasonable or unduly prejudicial freight charges. The complaint will be dismissed."

In the Merchants Refrigerating Co. case, the Commission was

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2. See X-267, X-281 and X-295.

dealing with a switch connection and siding trackage located upon railroad property and right-of-way, and whether the charge is labeled "rent" or is directly related to the actual cost of maintenance is immaterial as the decision clearly affirms the right of a railroad to levy a reasonable charge in such an instance.

Thus, the Merchants Refrigerating Co. case is almost on all fours with the instant proceeding in regard to LIRR's legal right to assess a charge against GMC for the switch connection and the only issue before the Commission is whether or not under all of the circumstances pertaining to the requirement that GMC bear the entire cost of maintaining the switch connection and trackage is reasonable and whether or not upon the refusal of GMC to execute a standard siding agreement with reasonable terms, LIRR may refuse to serve the siding.

## C. IT IS REASONABLE FOR GMC TO BEAR THE ENTIRE COST OF MAINTENANCE.

In the Merchants Refrigerating Co. case, the railroad in its rental charge not only sought to recapture maintenance costs of the switch connection and siding on its property but also interest on investment, taxes and amortization of what is assumed to be part of its investment cost. In the instant proceeding, LIRR only seeks to have GMC bear the actual expense of maintaining the switch connection and siding which expense would be billable and payable by GMC only when the expenses were actually incurred by LIRR.

Obviously, such an arrangement constitutes "reasonable terms" within the meaning of Section 1(9) and clearly are within the area of reason-

ability approved in the Merchants Refrigerating Co. case.

On the other hand, to require LIRR to absorb all or any portion of such costs in the face of its freight deficits and the unprofitability of GMC traffic would be unreasonable, arbitrary and subject to reversal upon judicial review.

### D. LIRR MAY REFUSE TO SERVE GMC AT ITS BETHPAGE SIDING IF GMC REFUSES TO EXECUTE A STANDARD SIDETRACK AGREEMENT CONTAINING REASONABLE TERMS.

Section 1(9) of the Act only requires a railroad to serve a sidetrack under certain conditions; namely, where it is practicable, safe and sufficient business justifies the construction and maintenance of the siding and then only upon reasonable terms.

Assuming that the Commission finds, as it properly should, that it is reasonable to require GMC to bear the entire cost of maintenance and unreasonable to require LIRR to absorb any or all of such costs, then it would be equally unreasonable and contrary to Section 1(9) to require LIRR to serve the siding unless and until GMC agrees to accept such reasonable terms. In such case, the choice of whether or not to disrupt operations at the GMC plant at Bethpage is entirely within the control of GMC since LIRR has clearly stated it will continue to serve the track if GMC executes the agreement and will only discontinue service if GMC continues to refuse to sign such agreement.

## CONCLUSION

GMC has sought to evade its reasonable responsibility to bear the

maintenance cost of a switch connection and private siding trackage from which it dervies exclusive benefit. By having such a siding, GMC avoids the expense and delay in having to unload at a public team track, truck to its warehouse and unload from the truck. LIRR has the burden of additional cost in serving the GMC siding as opposed to serving the nearby Hicksville team track facility and suffers the financial disability of having to handle the unprofitable GMC traffic. If on top of this LIRR had to absorb the cost of maintaining this private siding facility for the exclusive benefit of GMC, then such result would be inequitable, unreasonable and unjust.

Dated: Jamaica, New York
August 24, 1973.

Respectfully submitted,

GEORGE M. ONKEN
Attorney for Petitioner
The Long Island Rail Road Company
Jamaica Station
Jamaica, New York 11435

RICHARD H. STOKES
Of Counsel

EXHIBIT A, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR.

CE - 1

# THE LONG ISLAND RAIL ROAD COMPANY

## AGREEMENT FOR INDUSTRY TRACK

THIS AGREEMENT, made this ~~Sixth~~ day of ~~April~~ 19~~72~~

between The Long Island Rail Road Company

hereinafter called the Railroad Company, and ~~General Motors Corporation, 2441 Post Road Southport, Bernalt, Michigan, a Delaware Corporation~~ hereinafter called the Industry:

WITNESSETH,

WHEREAS, the Industry desires track facilities, hereinafter called side track, for the economical and convenient conduct of the business of the Industry, at or near ~~Bethpage~~ station, ~~County of Nassau~~ State of New York described as follows:

~~Beginning at P.S. A in the Main Line distant 0.65 miles east of Bethpage Station, running thence in a southeasterly direction through Point B thence around a curve to the right to~~

in accordance with plan numbered ~~CE 3885~~ dated ~~April 10, 1972~~ ~~Point C~~ designated as hereto attached and made a part hereof:

NOW, THEREFORE, in consideration of the covenants and agreements herein contained, it is mutually agreed that the said side track shall be ~~constructed and~~ maintained, and the Railroad Company hereby agrees to operate the same under the following terms and conditions:

RIGHT-OF-WAY.

1. The Industry shall provide, without cost to the Railroad Company, all necessary land or property outside of the right-of-way of the Railroad Company, required for the proper ~~construction and~~ operation of said side track, said amount of land or property to be satisfactory to the Railroad Company.

The cost and expense of procuring, or complying with any ordinance, order, permit or consent whatsoever required by Municipal, State or other lawfully constituted authorities for the ~~construction,~~ maintenance, operation and use of said side track shall be borne by the Industry.

The Railroad Company shall have the right to enter upon the property of the Industry, for the purpose of ~~constructing, maintaining and~~ operating said side track.

CONSTRUCTION.

~~2. The cost of constructing said side track, including roadbed, trestles, bridges and all other appurtenances in connection therewith,~~ shall be borne as follows:

EXHIBIT A, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

If the Railroad Company performs any construction or repair work on account of and at the expense of the Industry, the latter agrees to assume and pay:

The cost of the work, plus the usual percentages added for overhead. This cost includes the charges for use of work trains and hand and machine tools, as well as all labor, material and appliances. There shall also be added the cost of insurance protecting the Railroad Company from loss or damage for which it may be legally liable by reason of injury to persons or damage to property; provided, if the locomotive of the work train causes damage by fire to any property mentioned in Article 8 hereof, such loss or damage shall be borne by the parties hereto as provided in said Article 8.

MAINTENANCE.

3. Said side track shall be maintained (including removal of ice and snow) and renewed to the satisfaction of the Railroad Company; the work shall be performed and the cost thereof borne as follows:

The sidetrack between Points A and B shall be maintained by the Railroad Company, the cost of such maintenance to be repaid to it by the Industry from time to time upon rendition of bills therefor.
Between Points B and C by the Industry

OWNERSHIP.

4. The title and ownership of said side track shall be vested as follows:

Between Points A and B in the Railroad
Between Points B and C in the Industry.

USE.

5. The Railroad Company shall have the right to use the whole or any part of said side track, provided such use shall not unreasonably interfere with the use thereof by the Industry.

Neither party hereto shall permit or authorize the use of said side track by or for the benefit of any other person, firm or corporation not one of the parties hereto without the written consent of the other party. The Industry shall not assign this contract or any rights thereunder, without the written consent of the Railroad Company. The Railroad Company retains its own right to construct and use additional switch connection with that portion of the side track owned by itself when additional side tracks outside the provisions of this agreement may be necessary in the conduct of its business.

CHANGES OR ENLARGEMENTS.

6. If any change, rearrangement, extension or enlargement of said side track or its structures shall at any time be necessary by reason of any change in the Railroad Company's track or tracks, or because of any change in the operating practice of the Railroad, the Railroad Company shall not be required to bear any expense resulting therefrom except with respect to the portion of the side track owned by it.

CLEARANCES.

7. The Industry shall at all times hereafter establish and maintain on its property a clear and safe space above and on each side of the side track sufficient to insure the safety of employees and equipment of the Railroad Company, and the Industry shall indemnify and save harmless the Railroad Company from loss, damage and expense for failure so to do.

The Industry shall observe and comply with all rules and regulations of the Railroad Company governing the handling of inflammable liquids, including loading and unloading of tank cars, the location of racks and storage tanks, and protection of oil sidings from danger due to stray electric currents.

FIRE.

8. It is understood that the movement of railway locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad Company against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad Company negligence, arising from fire caused by locomotives operated by the Railroad Company on the side track, or in its vicinity, for the purpose of serving the Industry, except to the premises of the Railroad Company and to rolling stock belonging to the Railroad Company or to others, and to shipments in the course of transportation.

LIABILITY OTHER THAN FIRE.

9. The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about the side track. If any claim or liability, other than from fire caused by locomotives as aforesaid, shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally. The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury of any nature resulting from operation by the Railroad Company over the tracks of the Industry when such loss, damage or injury is due to any unsafe condition of the premises of the Industry.

EXHIBIT A, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

**DISCONTINUANCE.**

10. Any and all loss or damage sustained by the Industry in consequence of any temporary or permanent elimination of said side track, shall be assumed by the Industry, or in event the disposition of the property of the Railroad Company, or its future use or development shall make it impracticable in the judgment of the Railroad Company to continue the connection, the Industry hereby waives any and all claims therefor.

**CANCELLATION, TERMINATION AND REMOVAL.**

11. This agreement shall be terminable upon ninety (90) days' written notice from either party to the other.

Upon termination of this agreement the Railroad Company shall have the right to enter upon the property of the Industry and remove any or all of the material owned by the Railroad Company, and shall not be liable to account in any way to any one for any monies paid or expended on account of any of the track or tracks covered by this agreement, nor for any damages resulting from the removal of any or all of the material owned by the Railroad Company.

~~Likewise, the track material contained in that portion of the side track on railroad right-of-way, between the clearance point and~~ right-of-way line, which was paid for by the Industry, shall become the property of and be returned to the Industry, the latter bearing cost of salvaging. If the material be not reclaimed by the Industry within sixty (60) days after receipt of written notice, the ~~material shall become the property of the Railroad Company.~~

Until terminated as hereinbefore provided, this agreement shall inure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

~~at Jamaica Station Building, Sutphin Boulevard~~

IN WITNESS WHEREOF, the parties hereto haxe executed this agreement at Jamaica Station Building, Sutphin Boulevard and Archer Avenue, Jamaica, Borough and County of Queens, City and State of New York, the day and year first above written.

WITNESS: (For Railroad Company)

THE LONG ISLAND RAIL ROAD COMPANY

.....

By_____

WITNESS: (For Industry)

~~GENERAL MOTORS CORPORATION~~ _____ Industry

_____

By_____

Approved as to form:
George M. Onken
General Counsel

**Note:—**
**EXECUTION BY INDUSTRY:—In case the Industry is an individual, have such individual sign his name in full and affix thereto his seal; if the Industry is a corporation, insert the full name of the corporation and have agreement signed by the President, attested by its Secretary, and its corporate seal affixed.**

Issued
January 9, 1952.

EXHIBIT A, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

If the Railroad Company performs any construction or repair work on account of and at the expense of the Industry, the latter agrees to assume and pay:

The cost of the work, plus the usual percentages added for overhead. This cost includes the charges for use of work trains and hand and machine tools, as well as all labor, material and appliances. There shall also be added the cost of insurance protecting the Railroad Company from loss or damage for which it may be legally liable by reason of injury to persons or damage to property; provided, if the locomotive of the work train causes damage by fire to any property mentioned in Article 8 hereof, such loss or damage shall be borne by the parties hereto as provided in said Article 8.

MAINTENANCE.

3. Said side track shall be maintained (including removal of ice and snow) and renewed to the satisfaction of the Railroad Company; the work shall be performed and the cost thereof borne as follows:

The sidetrack between Points "A" and "G" shall be maintained by the Railroad Company, the cost of such maintenance to be paid by the Industry. The Railroad Company will proceed with the necessary repairs upon receipt of written authority from the Industry

Between Points "G" and "H" by the Industry

OWNERSHIP.

4. The title and ownership of said side track shall be vested as follows:

Between Points "A" and "H" in the Railroad

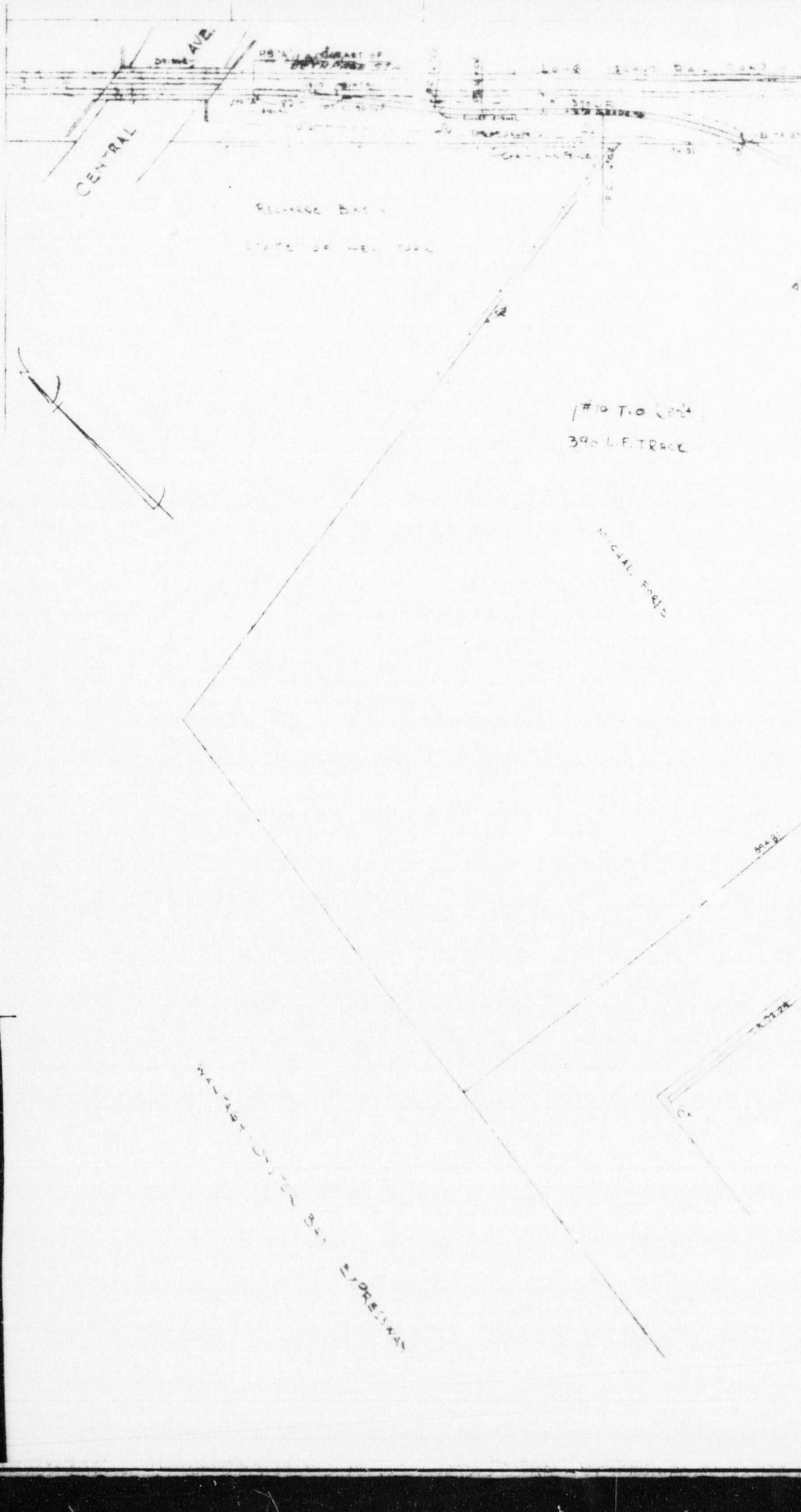

CENTRAL AVE.
RECHARGE BASIN
STATE OF NEW YORK
#10 T.O. LEAD
390 L.F. TRACK
CANAL FORK
ATLANTIC OCEAN BAY
LONG ISLAND

EXHIBIT A, ANNEXED TO FOREGOING
OPENING STATEMENT OF LIRR

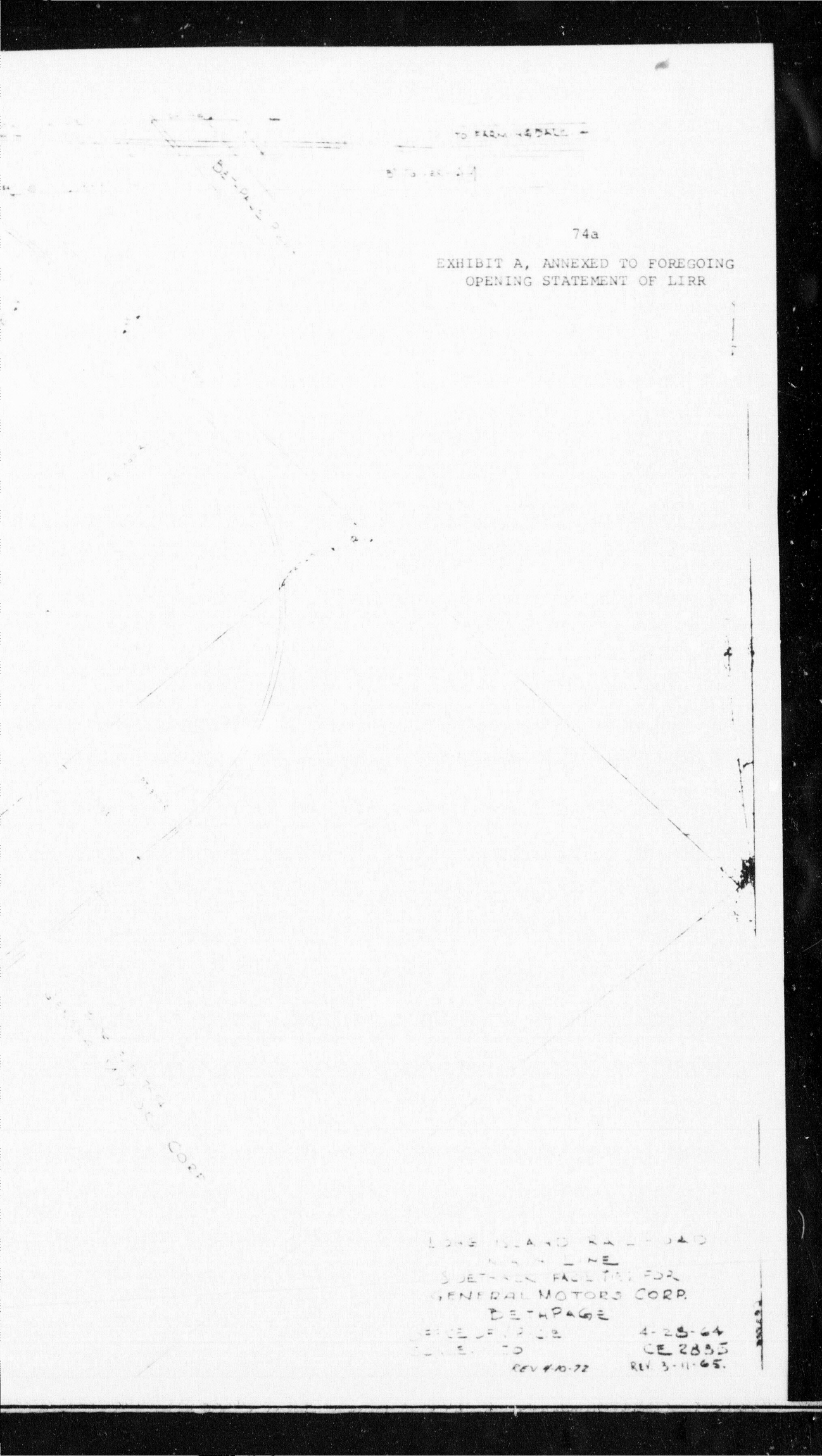


EXHIBIT B, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR.

My name is Nicholas C. La Rocco, and I am Manager-Engineering Contracts and Agreements for The Long Island Rail Road Company, joint-petitioner herein and hereinafter referred to as "LIRR." Among my duties, I have responsibility for the various contracts between the LIRR and the industries having private sidings along its right-of-way.

Prior to 1954, the practice of the LIRR was to require industries to bear the entire cost of maintaining private sidings and switch connections even though portions thereof were located on LIRR property. In November of 1954, this policy was changed by resolution of the Board of Directors in order to meet the increasing competition of other modes of competition and to attract additional industry to Long Island, (a copy of the Board resolution dated November 10, 1954, is annexed hereto and made a part hereof as Exhibit 1).

In September of 1970, faced with soaring deficits from freight operations, the LIRR was forced to recind this policy and revert back to its pre-1954 policy of requiring industries to bear the entire cost of maintenance. Since that date, we have renegotiated some 169 sidetrack agreements out of a total of 278 to reflect this policy and hope within the course of the next year to have all of the agreements so renegotiated.

The average cost to LIRR of maintaining a main track switch connection in diesel territory such as GMC's switch connection at Bethpage is $2,908.00 and the average cost of maintaining private siding trackage on railroad property is $0.92 per linear foot. In the case of the GMC private

EXHIBIT B, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

siding, besides the switch connection there are 390 linear feet of siding trackage located on LIRR property. Thus, the average annual maintenance expense for this portion of the private siding would total $3,266.80 ($2,908.00 plus $0.92 x. 390).

The GMC private sidetrack was constructed and put into service in late 1965. Since that time, GMC has refused to execute the standard private siding agreement tendered by LIRR.

Nicholas C. La Rocco
NICHOLAS C. LA ROCCO

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS )

NICHOLAS C. LA ROCCO, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Nicholas C. La Rocco
NICHOLAS C. LA ROCCO

Subscribed and sworn to before
me this 24th day of August, 1973.

SEAL

Mary Gallo
Mary Gallo

Notary Public, State of New York
No. 52-1365325, Suffolk County
Term Expires March 30, 1975.

EXHIBIT B, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

- COPY -

THE LONG ISLAND RAIL ROAD COMPANY
Office of the Secretary

10th November, 1954

Dear Sir:

At a meeting of the Board of Directors this day, the following action was taken:

RESOLVED that the Board approves and authorizes the adoption of a refundable guarantee deposit policy in connection with the construction of new sidetracks. The past practice has been for the industry desiring a sidetrack to pay for the construction of the entire sidetrack from point of switch to end of track. Ownership of track from point of switch to right-of-way line was assigned to the railroad by the industry who were responsible for maintenance of entire track, including portion assigned to railroad. Under the new policy the industry will pay the cost of construction of the portion of the sidetrack beyond the right-of-way line and will deposit with the railroad a sum equivalent to the cost of construction of the portion of the sidetrack on the railroad's right of way, such deposit to be refunded to the industry in amounts equivalent to $5.00 per car for each car received at or shipped from the sidetrack during the five years immediately following construction thereof, on which The Long Island Rail Road Company's earnings are $45.00 or more. The portion of the sidetrack between the point of switch and right-of-way line will be the property of the railroad and the railroad is responsible for the maintenance cost of that portion of the sidetrack.

Yours truly,

Secretary

Mr. T. M. Goodfellow
Vice President and General Manager

Mr. Lawrence Chaffee
General Attorney

Mr. F. Aikman, Jr.
Engineer Maintenance of Way

Mr. K. M. Potter
Freight Traffic Manager

Mr. R. I. Kistler
Comptroller

Mr. N. J. Aydelotte
Manager of Real Estate,
Purchases and Insurance

EXHIBIT C, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR.

My name is Donald M. Kadel, and I am Assistant Freight Train Master for The Long Island Rail Road Company, joint petitioner herein and hereinafter referred to as LIRR. In such position, I have supervisory responsibility for and a personal knowledge of the freight operations of the LIRR, particularly the freight operations covering the service for GMC's siding at Bethpage.

All of the 35 freight cars handled by LIRR during June 1973 to GMC at Bethpage and shown in the study of Joseph J. Remington submitted simultaneously herewith were received in interchange from the Penn Central Transportation Co. at Fresh Pond Junction, Queens County, New York. These cars would be received in interchange in a train containing three blocks at approximately 10:30 p.m. and would be picked up by a LIRR road freight at 11:59 p.m. The LIRR road freight would pull the three blocks off of the interchange track, around the wye to the LIRR yard at Fresh Pond where it switched and set out the Long Island City block and the Fresh Pond block before proceeding to Holban Yard with the remaining third block.

Following arrival at Holban Yard at approximately 2:30 a.m., the train would be set out on two tracks where it would then be classified into appropriate blocks for movement beyond. After classification, the block containing the GMC cars would be moved up to the outbound yard at Hillside where a road freight would pick them up at about 11:00 p.m. and move them out to Wellwood Terminal arriving at about 1:00 a.m. where

the GMC cars would be set out along with other cars for that general area.

The next morning at approximately 8:00 a.m. the cars would be picked up by a westbound freight and the GMC siding would be switched at about 11:00 a.m. GMC normally only holds cars for 24 hours and the next day the empty would be switched out at 11:00 a.m. and be brought back to Wellwood Terminal, arriving about 4:00 p.m.

At approximately 8:00 p.m. the empties would be picked up at Wellwood Terminal by a road freight and returned to Holban Yard. The next morning it would be classified for return to Penn Central and would depart from Holban at 3:59 for Fresh Pond where it would be interchanged back to Penn Central at about 6:30 p.m.

In serving the GMC siding at Bethpage, it can be seen that the road freight hauling the cars eastward must pass not only the public team track facility and yard at Hicksville but also the GMC siding, proceeding approximately another 2.5 miles beyond that point, to Wellwood Terminal, following which they must be back hauled to Bethpage for setting out on the siding. This additional movement is required because the GMC siding has a facing point switch connection on the eastbound main line.

In comparing the cost of servicing the GMC private siding at Bethpage compared with the cost of placing the cars at our modern team track facility at Hicksville, it must be noted that the Bethpage switching must be done through the interlocking and it not only involves switching an electrically interlocked facing point switch in an eastbound direction on an eastbound main line track but also all

EXHIBIT C, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

switching moves here are subject to delay by passenger moves.

The GMC siding has a capacity of four cars and if four empty cars are ready to be removed and four loaded cars are to be placed, I estimate the time to switch the siding to be about 45 minutes. However, if any of the cars on the siding are not empty and have to be respotted along with the placement of the loaded cars, the switching time would have to be doubled to 90 minutes.

The switching of comparable cars at the Hicksville team track, because there is not only a lead track, but also a runaround track, takes only 15 minutes where no cars have to be respotted and 20 minutes where one or more of the cars has to be respotted.

A table of costs comparing the two switching operations at these two points is as follows:

| | Bethpage | | Hicksville | |
|---|---|---|---|---|
| | 45 min. | 90 min. | 15 min. | 20 min. |
| Engineer @ $7.72/hr. | $ 5.79 | $11.58 | $1.93 | $ 2.57 |
| Conductor @ $7.72/hr. | 5.71 | 11.43 | 1.91 | 2.55 |
| 2 Brakemen @ $6.83/hr. ea. | 10.24 | 20.48 | 3.42 | 4.56 |
| Total Labor | $21.74 | $43.49 | $7.26 | $ 9.68 |
| One 1000 hp diesel @ GMA rate $6.70/hr. | 5.03 | 10.05 | 1.68 | 2.24 |
| Total cost (4 cars) | $26.77 | $53.54 | $8.94 | $11.92 |
| Cost 1 car | $ 6.69 | $13.38 | $2.23 | $ 2.98 |

(Verified by Donald M. Kadel, August 24, 1973.)

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

My name is James L. Faraci, and I am General Freight Agent of The Long Island Rail Road Company, Petitioner herein (hereafter LIRR) and in such capacity I have responsibility for freight rates and divisions thereof and all other related matters, and I am familiar with the freight service requirements of our patrons, the nature of their traffic and we maintain statistics pertaining thereto.

Annexed hereto and made a part hereof as Exhibit 1 are photocopies of 38 waybills covering the freight cars handled by LIRR to the GMC siding at Bethpage and shipped during the month of June, 1973. These waybills show the rates under which this traffic moved from the various origin points to destination at Bethpage. These rates have been rechecked and I believe them to be the true, proper and legal rates for such traffic.

From the records kept by the LIRR as compiled by my office, the cars received by GMC at its Bethpage siding since 1965 are as follows:

| | |
|---|---|
| 1965 | 88 cars |
| 1966 | 378 cars |
| 1967 | 521 cars |
| 1968 | 509 cars |
| 1969 | 538 cars |
| 1970 | 454 cars |
| 1971 | 541 cars |
| 1972 | 585 cars |

As shown by the verified statement of John E. Cremmins submitted simultaneously herewith, the LIRR during recent years has sustained extensive deficits from its freight operations. In an effort to eliminate or reduce its deficits in this regard, the LIRR in 1969 commenced a proceeding

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

before this Commission seeking a revision of its divisions of the freight revenue. In this proceeding the Commission, by Division 2, has ordered a change in LIRR's divisions which will produce an anticipated additional revenue to LIRR of approximately $1,400,000 per year. However, because of appeals, this order has not yet become final and in any event, it will only reduce the deficit by about 14 percent leaving LIRR with an annual deficit from freight operations of about $10,000,000.

The general freight rate increases since 1968 have not helped LIRR in the slightest since the loss of traffic suffered by LIRR during this period has almost exactly equaled the percentage of the rate increase which was imposed over the objection of LIRR. In the latest increase, X-295, the LIRR's flagout has finally been recognized and the tariffs contain the appropriate Exception. It is hoped that the resultant rate differential, by improving LIRR's competitive situation, will enable it to retain its present traffic and possibly recapture some of what has been lost in the past.

In paragraph 10 of the joint petition, GMC contends that LIRR cannot discontinue service to its Bethpage private sidetrack unless and until it canceled the rates published covering this traffic. Such a contention is obviously ridiculous, since the rates published as well as freight rates generally are from an origin station to a destination station and are not published from a private siding to a private siding. It is elementary that if for any reason, whether act of God, force majeur, carrier action or any other reason, the GMC siding was put out of service, GMC would

still be able to receive its traffic at any adjacent public team track facility under the same rates and tariffs. In this regard, when considering the establishment of line haul rates, it is not the usual practice to differentiate between deliveries at public team tracks and deliveries at private sidings as any additional costs for handling and maintenance of a private siding is handled as a separate matter not involving freight rates between the individual carrier and the industry.

My office furnished to Mr. Remington, for use in his cost analysis, the short line miles for the involved traffic between the various origin points and "New York, N. Y." and these figures were obtained from Trunk Line Central Territory Railroad Freight Tariff E-1009-A; ICC-C-391, B.B. Maurer, Agent.

(Verified by James L. Faraci, August 24, 1973.)

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

PLACE SPECIAL SERVICE LABELS HERE

GRAND TRUNK WESTERN RAILROAD CO.-396

FREIGHT WAYBILL

NOT TO BE USED FOR INTRASTATE CONSIGNMENTS UNLESS ACCEPTED & CARRIED

CAR INITIALS AND NO. MKT 99654 345

GRD B

WEIGHT IN TONS: GROSS | TARE | NET

ESTIMATED OR ACTUAL: ESTIMATED | ACTUAL

MARKED CAPACITY OF CAR: CAPACITY | TRUCKS

STOP THIS CAR AT 229603

C. L. Transferred to or L. C. L. Loading No.

DATE JUNE 1 1973

WAYBILL No. 290682 XXXXXX

Consignee and Address at STOP

AT

AT

TO No. ( 779 ) STATION BETHPAGE, L.I. STATE or PROV. NEW YORK 0132

FROM No. ( 5612 ) STATION WATERFORD, MICH. STATE or PROV.

ROUTE (Show each Junction and Carrier in Route order to destination of waybill)

GTW PT HURON 5800 CN GTE SUSB PC L

ROUTE CODE No. 436

Show "A" if Agent's Routing or "B" if Shipper's Routing

FULL NAME OF SHIPPER, AND, FOR C.O.D. SHIPMENTS, THE CORRECT AND POST OFFICE ADDRESS, AND INVOICE NUMBER

GMPD GMC

CODE No. 320 090 47

RECONSIGNED TO STATION STATE OR PROV.

ORIGIN AND DATE, ORIGINAL C.R. TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL REFERENCE AND ROUTING WHEN REBILLED

AUTHORITY

Consignee and Address

GMPD GMC

CODE No. 320 090

AMOUNT C.O.D. $

FEE C.O.D. $

TOTAL C.O.D. $

PICKUP SERVICE YES NO

DELIVERY SERVICE REQUESTED YES NO

WEIGHED

AT

GROSS

TARE

ALLOWANCE(S) DEDUCTED

NET

IF CHARGES ARE TO BE PAID, WRITE OR STAMP HERE "TO BE PREPAID" PREPAID

FINAL DESTINATION AND ADDITIONAL ROUTING

ON C. L. TRAFFIC – INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged)

ASSIGNED CAR RETURN WHEN MTY CSD 145

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE NO-RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES"

ON L. C. L. TRAFFIC TRANSFER STAMPS TO BE SHOWN IN THIS SPACE

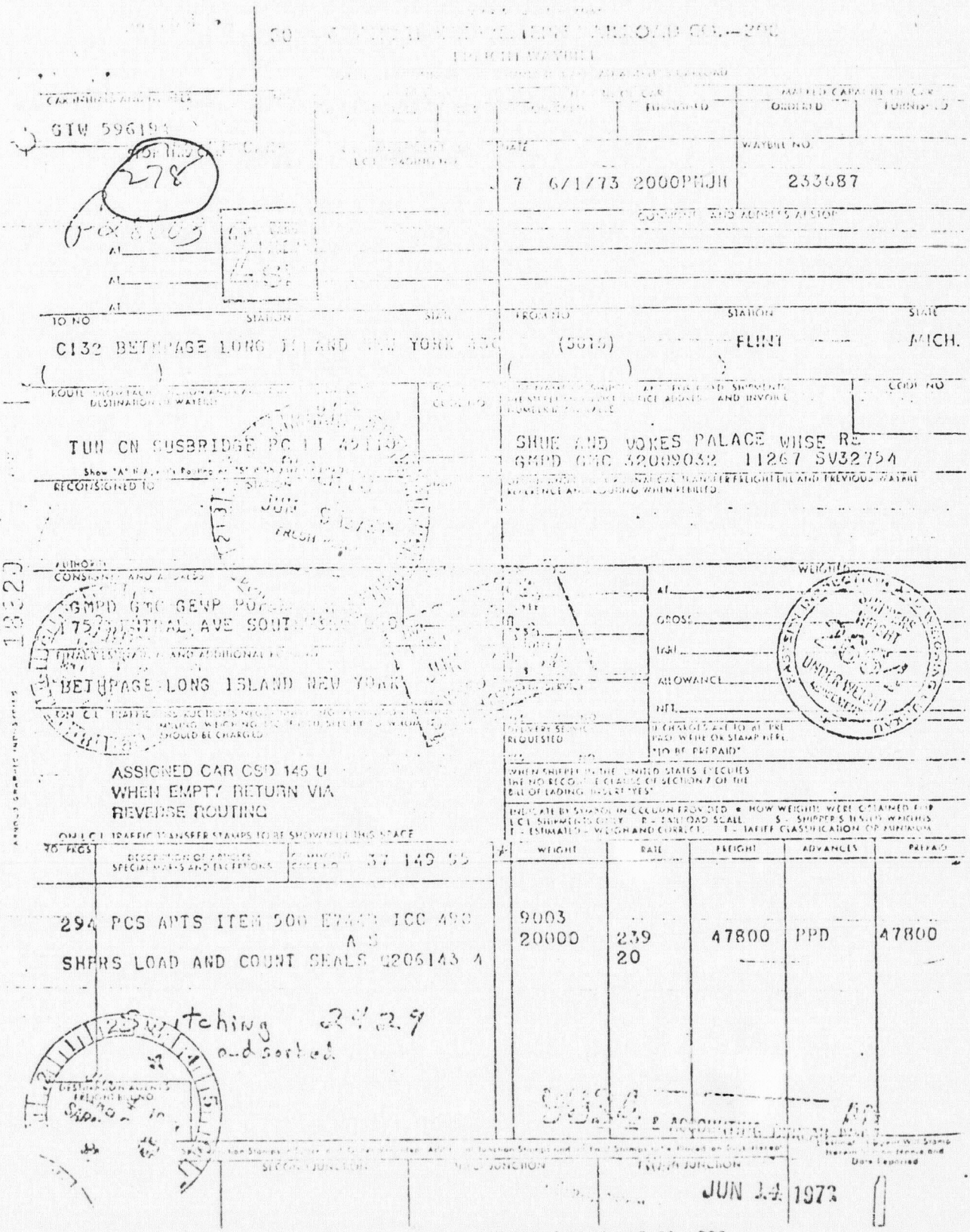
Indicate by symbol in Column provided ★ how weights were obtained for L. C. L. Shipments only. R – Railroad Scale S – Shipper's Tested Weights E – Estimated – Weigh and Correct T – Tariff Classification or Minimum

| No. Pkgs. | Description of Articles, Special Marks and Exceptions | Commodity Code No. 37 149 95 | ★ | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|
| | C/L AUTO PARTS<br>B/L# 111259<br>SEALS 207996-9907<br>CAR AHEAD 5/31/73 | | | 11348<br>AS<br>20000 | 239<br>(12)<br>(20) | 478.00 | | 478.00 |

Destination Agent's Freight Bill No.

| FIRST JUNCTION | SECOND JUNCTION | THIRD JUNCTION | FOURTH JUNCTION | INFORMATION AND STAMP HERE NAME AND DATE |
|---|---|---|---|---|
| | | EXHIBIT 1 | REP. | JUN 14 1973 |

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



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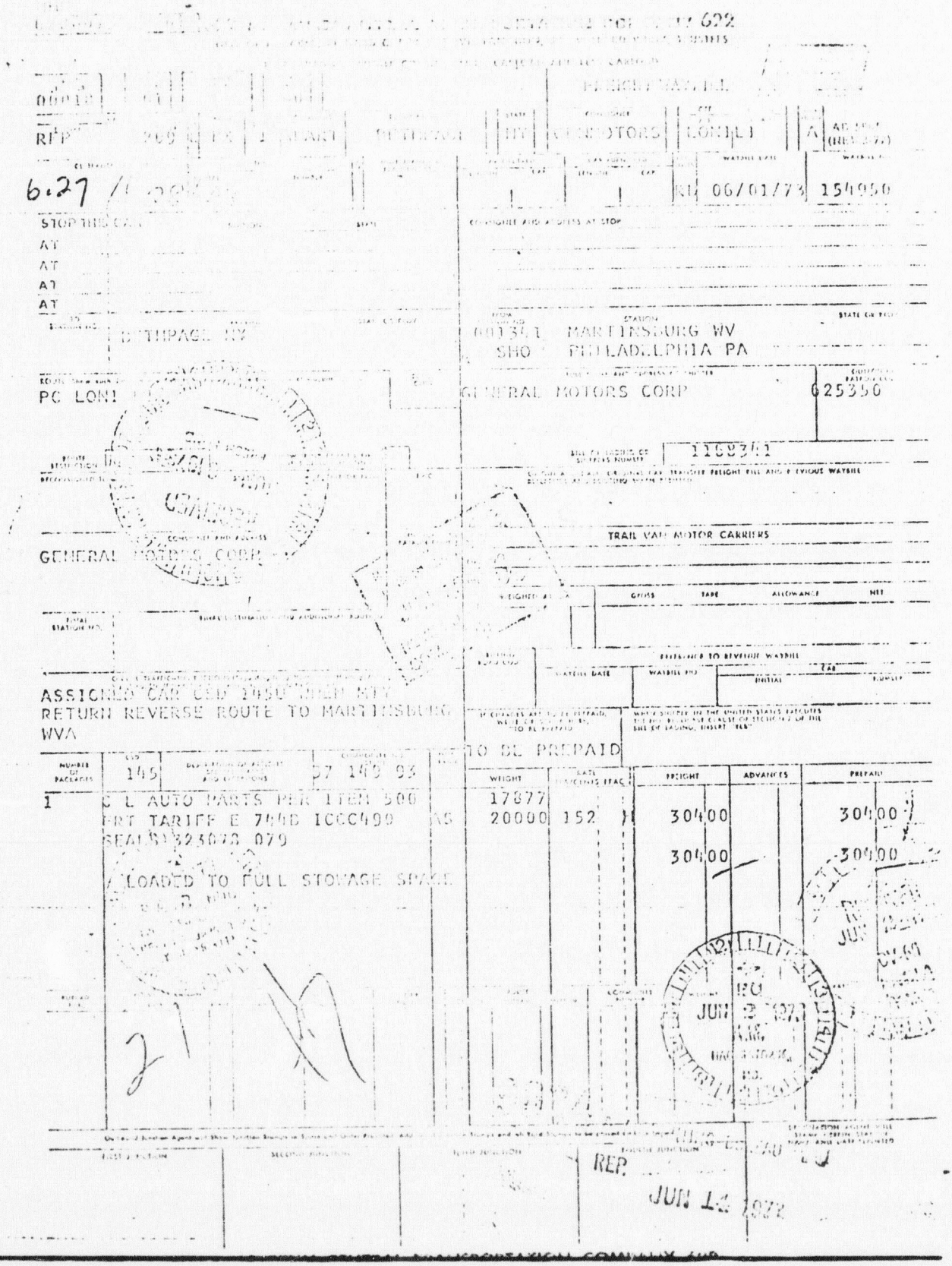


622

FREIGHT WAYBILL

RFP [illegible] GENERAL MOTORS LONIL A

6.27 [illegible]

RL 06/01/73 154950

STOP THIS CAR AT
AT
AT
AT

DUTHPAGE KY

001341 MARTINSBURG WV
SHO PHILADELPHIA PA

PC LONI GENERAL MOTORS CORP 625350

11003/1

TRAIL VAN MOTOR CARRIERS

GENERAL MOTORS CORP

GROSS TARE ALLOWANCE NET

ASSIGNED CAR CSD 2050 LOAD KY
RETURN REVERSE ROUTE TO MARTINSBURG WVA

TO BE PREPAID

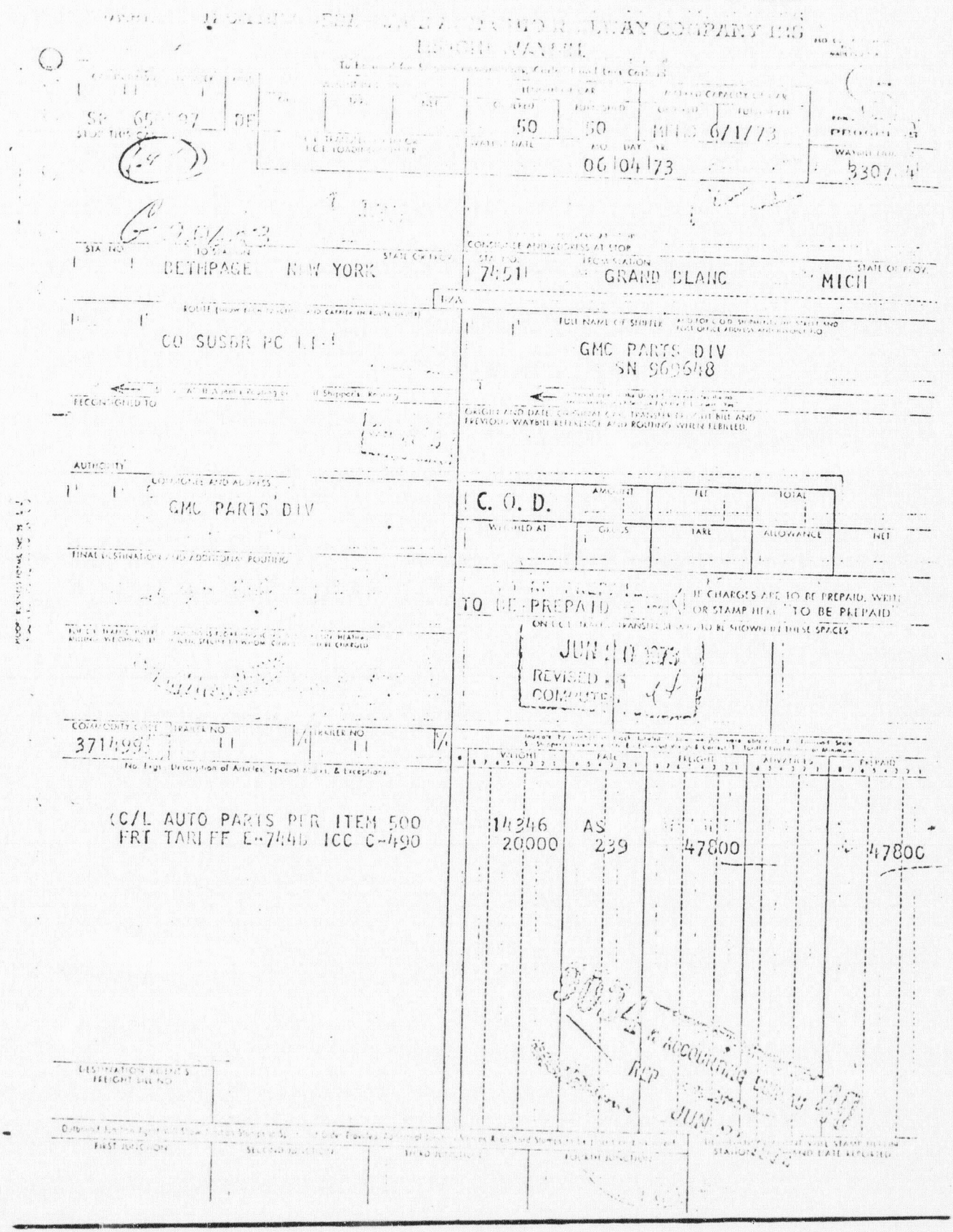
| NUMBER OF PACKAGES | CLASS | | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|
| 1 | 145 | 57 140 93 | 17877 | | 30400 | | 30400 |
| | C L AUTO PARTS PER ITEM 500 | | 20000 | 152 | 30400 | | 30400 |
| | RT TARIFF E 7448 ICCC499 | AS | | | | | |
| | SEALS) 323078 079 | | | | | | |
| | LOADED TO FULL STOWAGE SPACE | | | | | | |

JUN 2 1973

REP

JUN 14 1973

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



50 50 6/1/73

06 04 73

330

BETHPAGE NEW YORK

74511 GRAND BLANC MICH

CO SUSQR PC LI

GMC PARTS DIV
SN 969648

GMC PARTS DIV

C. O. D.

TO BE PREPAID

JUN 1 0 1973
REVISED
COMPUTED

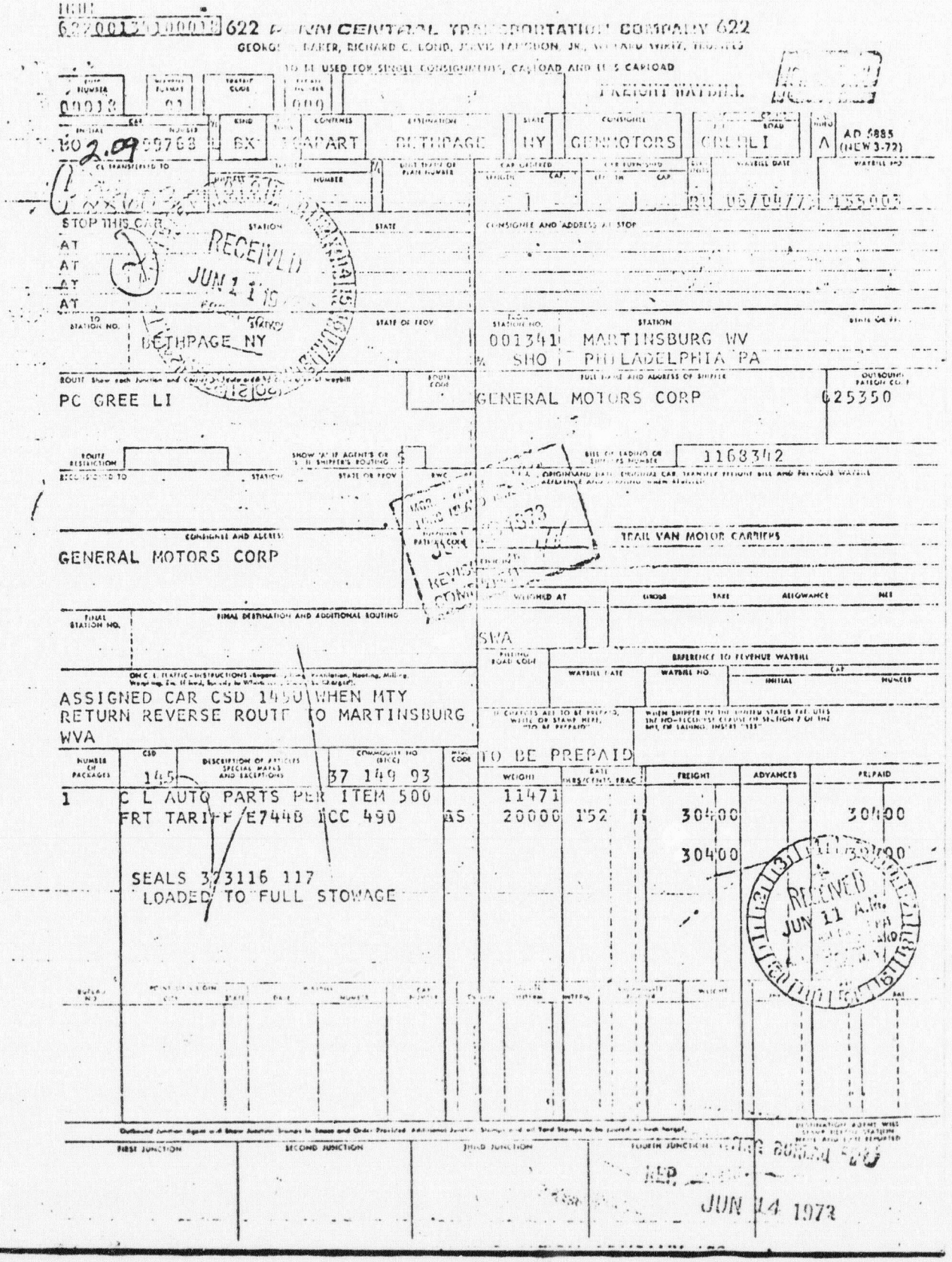
371499

C/L AUTO PARTS PER ITEM 500
FRT TARIFF E-7446 ICC C-490

14346 AS 47800 47800

RECEIVED
JUN 22 1973
ACCOUNTING DEPT
REP

**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**



622 PENN CENTRAL TRANSPORTATION COMPANY 622

GEORGE E. BAKER, RICHARD C. BOND, JOHN FAIRBURN, JR., WILLARD SMITH, TRUSTEES

TO BE USED FOR SINGLE CONSIGNMENTS, CARLOAD AND LESS CARLOAD

FREIGHT WAYBILL

AD 5885 (NEW 3-72)

CAR NUMBER: 99768 | KIND: BX | CONTENTS: AUTO PART | DESTINATION: BETHPAGE | STATE: NY | CONSIGNEE: GENMOTORS | ROAD: CRLI | SERVICE: A

CAR TRANSFERRED TO

STOP THIS CAR AT

AT

AT

AT

RECEIVED JUN 21 19

TO STATION NO. BETHPAGE NY STATE OF FROV

FROM STATION NO. 001341 STATION MARTINSBURG WV STATE OF FROV

SHOP PHILADELPHIA PA

ROUTE: Show each Junction and Connecting Road of Route: PC GREE LI

FULL NAME AND ADDRESS OF SHIPPER: GENERAL MOTORS CORP

OUTBOUND PATRON CODE: 025350

ROUTE RESTRICTION

SHOW "AS" IF AGENT'S OR SHIPPER'S ROUTING

RECONSIGNED TO STATION STATE OR PROV

BILL OF LADING OR SHIPPER'S NUMBER: 1168342

(E.A. ORIGIN AND DATE ORIGINAL CAR, TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL ACCEPTABLE AND REQUIRED WHEN APPLICABLE)

CONSIGNEE AND ADDRESS: GENERAL MOTORS CORP

TRAIL VAN MOTOR CARRIERS

FINAL STATION NO.

FINAL DESTINATION AND ADDITIONAL ROUTING

WEIGHED AT: SWA

GROSS | TARE | ALLOWANCE | NET

ON C. L. TRAFFIC—INSTRUCTIONS (Reporting, Diversion, Reconsignment, Reweighing, Milling, Weighing, Etc. If load, to be Weighed, Check (X) Box at Right)

ASSIGNED CAR CSD 1450 WHEN MTY
RETURN REVERSE ROUTE TO MARTINSBURG WVA

FREIGHT BILL ROAD CODE

REFERENCE TO REVENUE WAYBILL: WAYBILL DATE | WAYBILL NO. | CAR INITIAL | CAR NUMBER

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE, "TO BE PREPAID"

WHEN SHIPPER IN THE UNITED STATES USE THE NON-RECOURSE CLAUSE IN SECTION 7 OF THE BILL OF LADING, INSERT "115"

TO BE PREPAID

| NUMBER OF PACKAGES | CSD | DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS | COMMODITY NO. (STCC) | PKG CODE | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 1450 | C L AUTO PARTS PER ITEM 500 FRT TARIFF E744B ICC 490 | 37 149 93 | AS | 11471 20000 | 152 | 30400 30400 | | 30400 30400 |
| | | SEALS 373116 117 LOADED TO FULL STOWAGE | | | | | | | |

RECEIVED JUN 11 A.M. P.M. MAIL ROOM

Outbound Junction Agent will Show Junction Stamps in Space and Order Provided. Additional Junction Stamps will be Entered on Yard Stamps to be Secured at Each Yard.

DESTINATION AGENT WILL SHOW DISPOSITION OF STATION RECEIPTS AND CAR REPORTED

FIRST JUNCTION | SECOND JUNCTION | THIRD JUNCTION | FOURTH JUNCTION

JUN 14 1973

**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

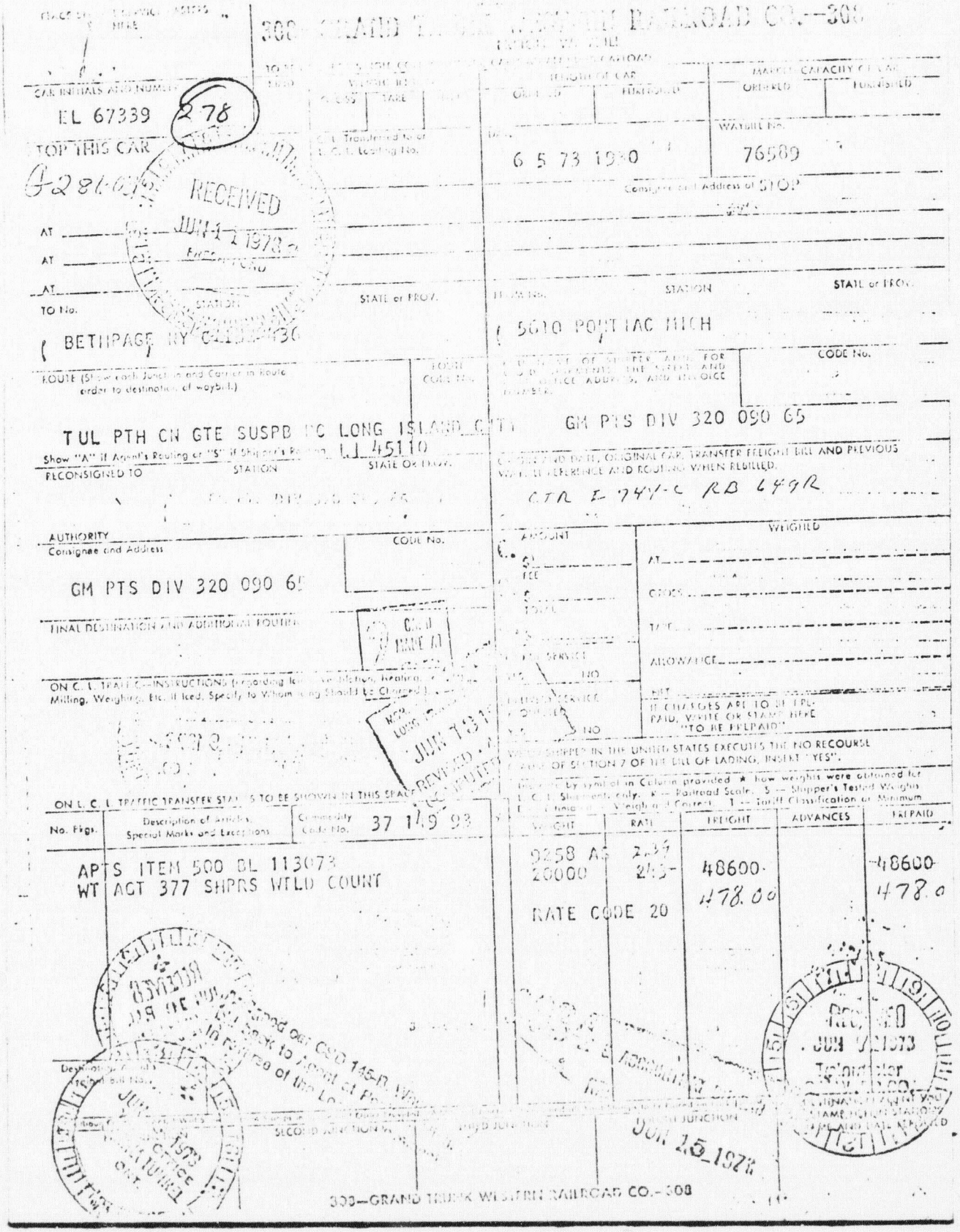
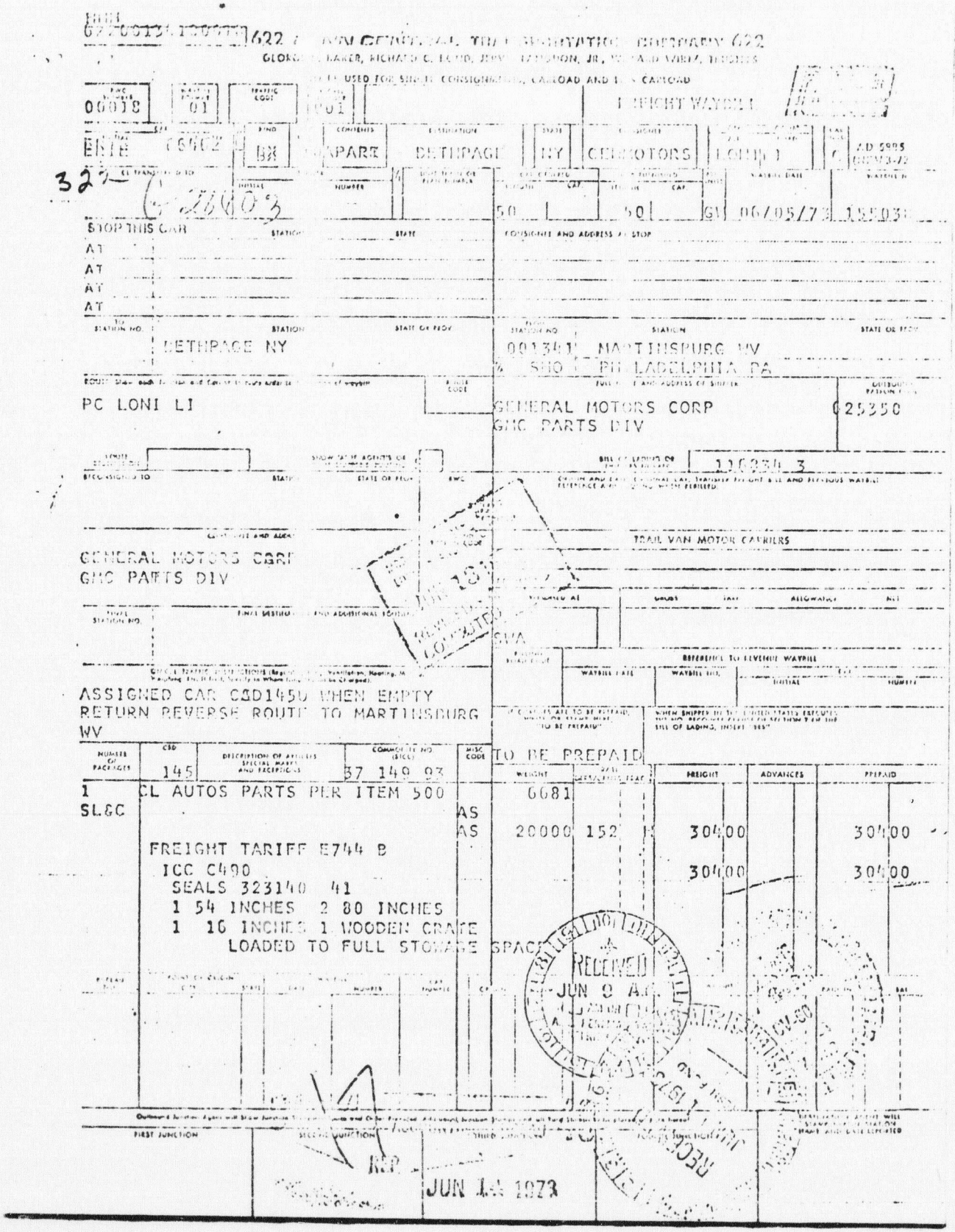


**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

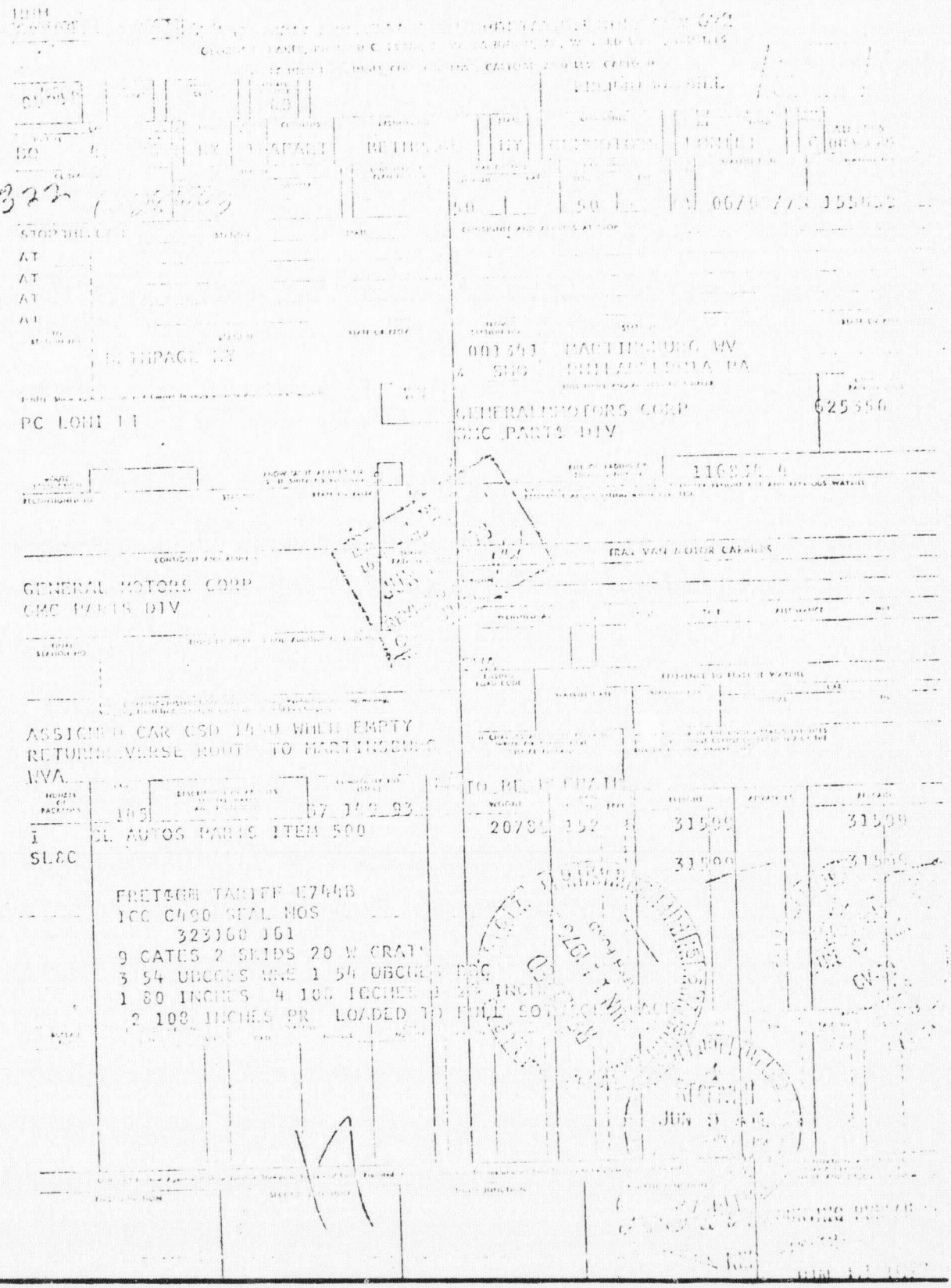


BILL
622 0615 [illegible] 622 / TRAIL GENERAL TRUCK CORPORATION, CORPORATION 622
GEORGE E. BAKER, RICHARD C. REID, JOHN [illegible] JR., [illegible] WARE, TRUSTEES
NOT USED FOR SINGLE CONSIGNMENT, CARLOAD AND LESS CARLOAD
FREIGHT WAYBILL
00018 | 01 | 001
ENTE C5962 | BX | APART | BETHPAGE | NY | GENMOTORS | LONG I | C | AD 5995
32- C 26803
50 | 50 | GV | 06/05/73 | 155038
STOP THIS CAR AT | STATION | STATE
AT
AT
AT
STATION NO. | STATION | STATE OF DEST
BETHPAGE NY
CONSIGNEE AND ADDRESS OF STOP
001341 MARTINSBURG WV
SHIPPER PHILADELPHIA PA
ROUTE
PC LONI LI
FORWARDING AGENT AND ADDRESS OF SHIPPER
GENERAL MOTORS CORP 025350
GMC PARTS DIV
BILL OF LADING OR WAYBILL NO. 110234 3
RECONSIGNED TO | STATE | STATE OF DEST
CARRIER AND AGENT
GENERAL MOTORS CORP
GMC PARTS DIV
TRAIL VAN MOTOR CARRIERS
RECEIVED AT | GROSS | TARE | ALLOWANCE | NET
SUA
REFERENCE TO REVENUE WAYBILL
WAYBILL DATE | WAYBILL NO. | INITIAL | NUMBER
ASSIGNED CAR CSD1450 WHEN EMPTY
RETURN REVERSE ROUTE TO MARTINSBURG
WV
CHARGES TO BE PREPAID OR OTHER MODE TO BE PREPAID
WHEN SHIPPED TO THE UNITED STATES ESTATES NOT NO. RECOURSE PLEASE FOR SECTION 9 OF THE BILL OF LADING, INSERT "YES"
TO BE PREPAID

| NUMBER OF PACKAGES | CSD | DESCRIPTION OF ARTICLES SPECIAL MARKS AND EXCEPTIONS | COMMODITY NO. (STCC) | MISC CODE | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 145 | CL AUTOS PARTS PER ITEM 500 | 37 140 03 | | 6681 | | | | |
| SL&C | | | | AS | | | | | |
| | | | | AS | 20000 | 152 | 304 00 | | 304 00 |
| | | FREIGHT TARIFF E744 B | | | | | | | |
| | | ICC C490 | | | | | 304 00 | | 304 00 |
| | | SEALS 323140 41 | | | | | | | |
| | | 1 54 INCHES 2 80 INCHES | | | | | | | |
| | | 1 16 INCHES 1 WOODEN CRATE | | | | | | | |
| | | LOADED TO FULL STORAGE SPACE | | | | | | | |

RECEIVED JUN 9 AT
JUN 14 1973

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



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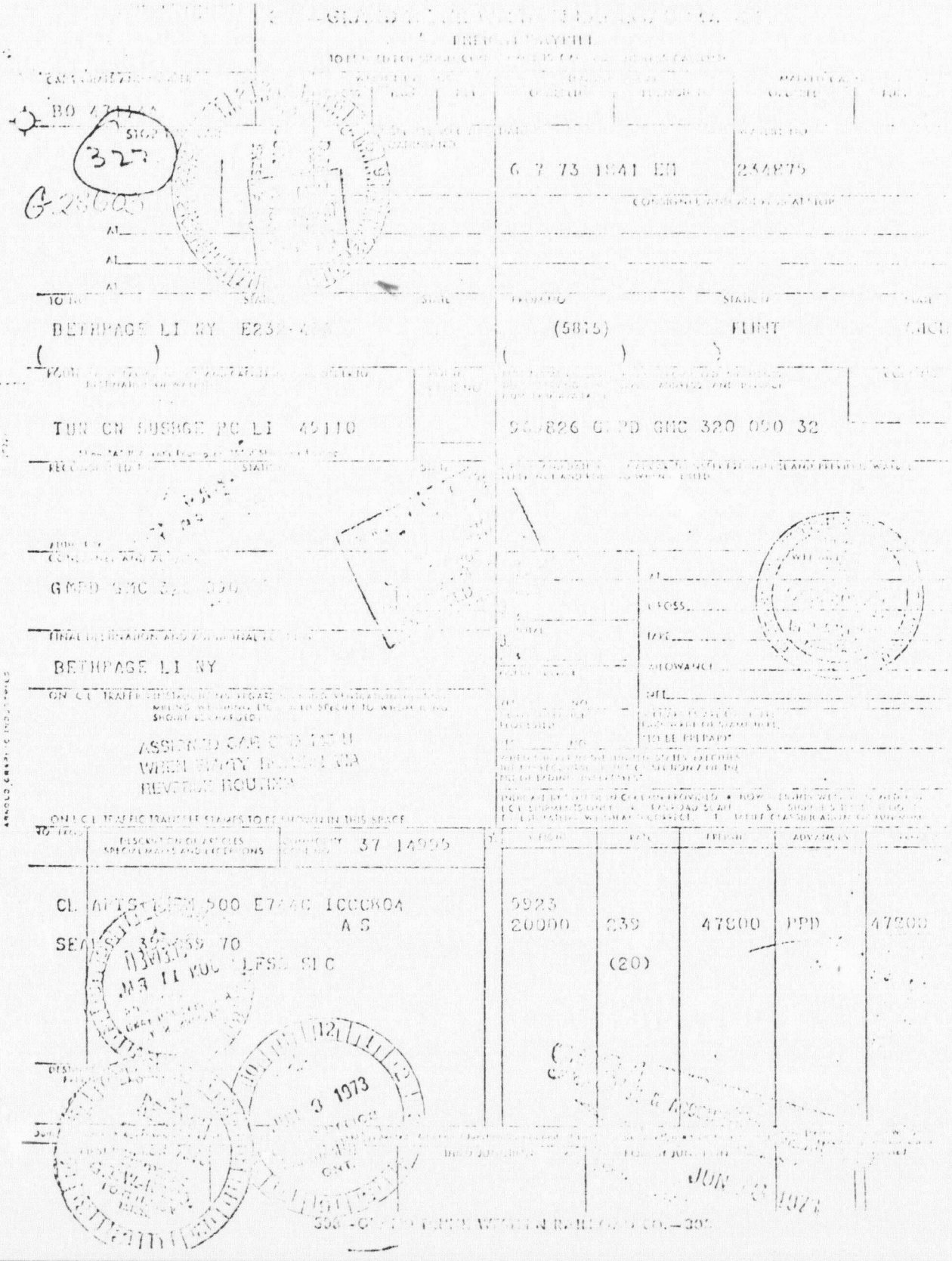

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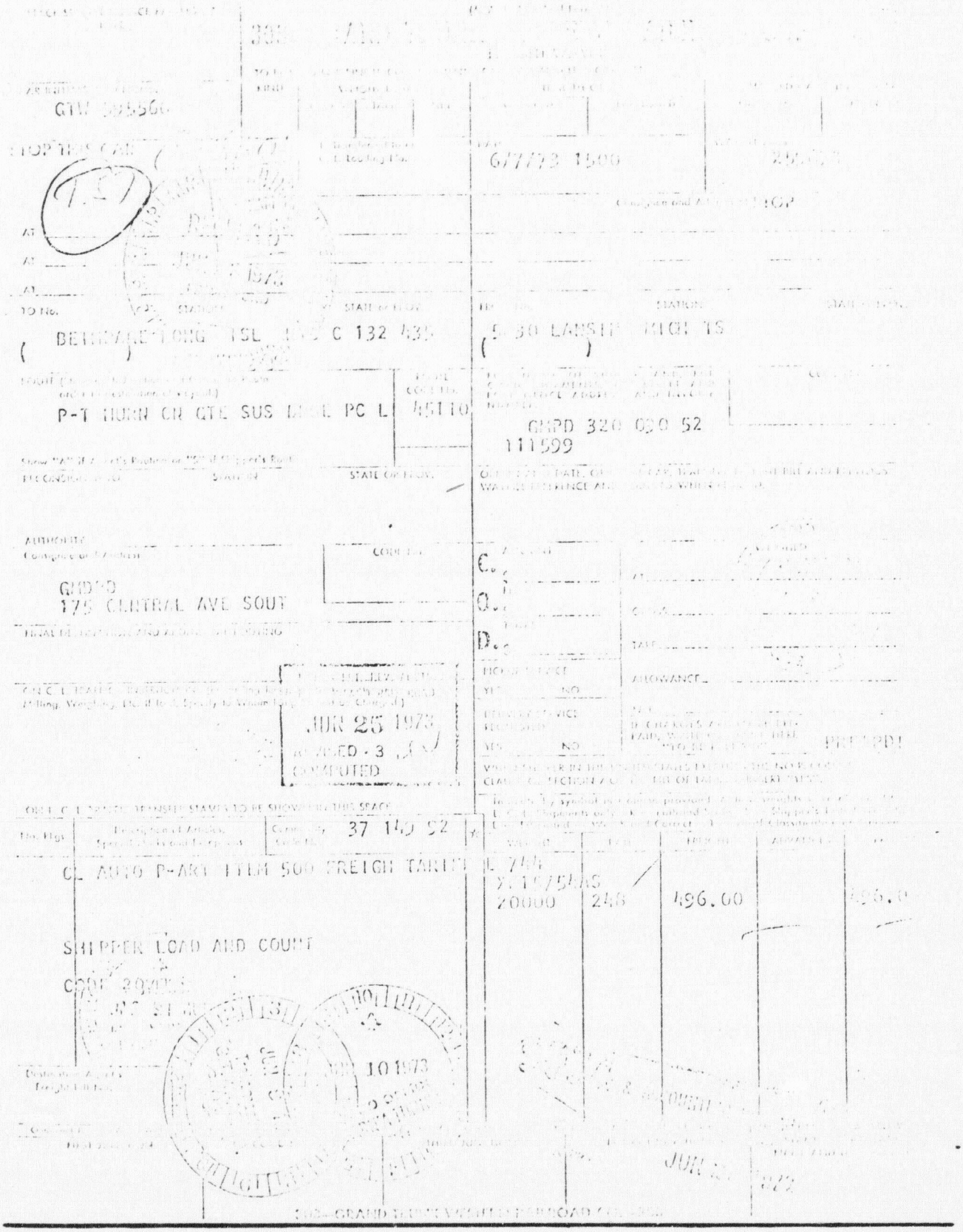

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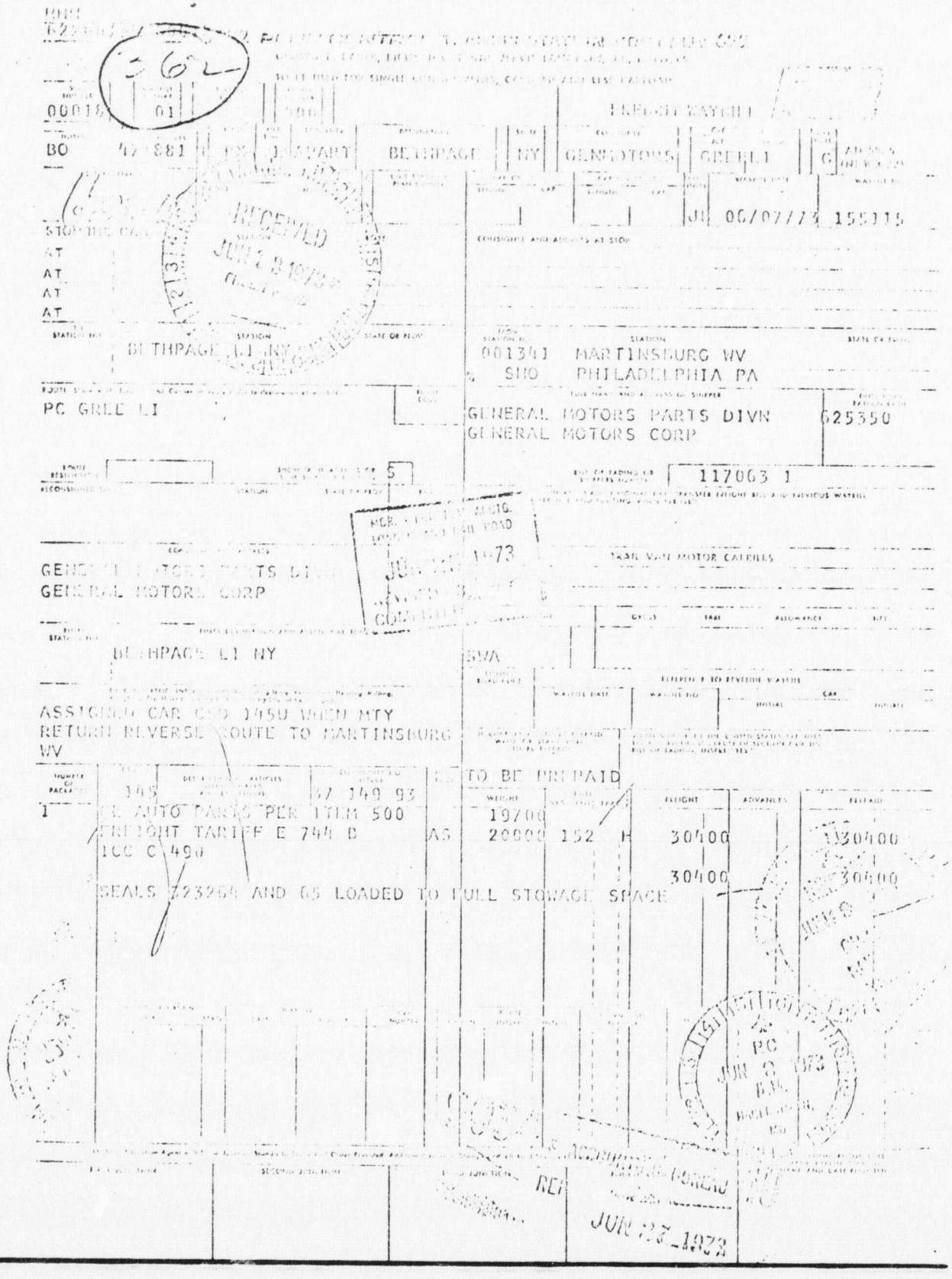
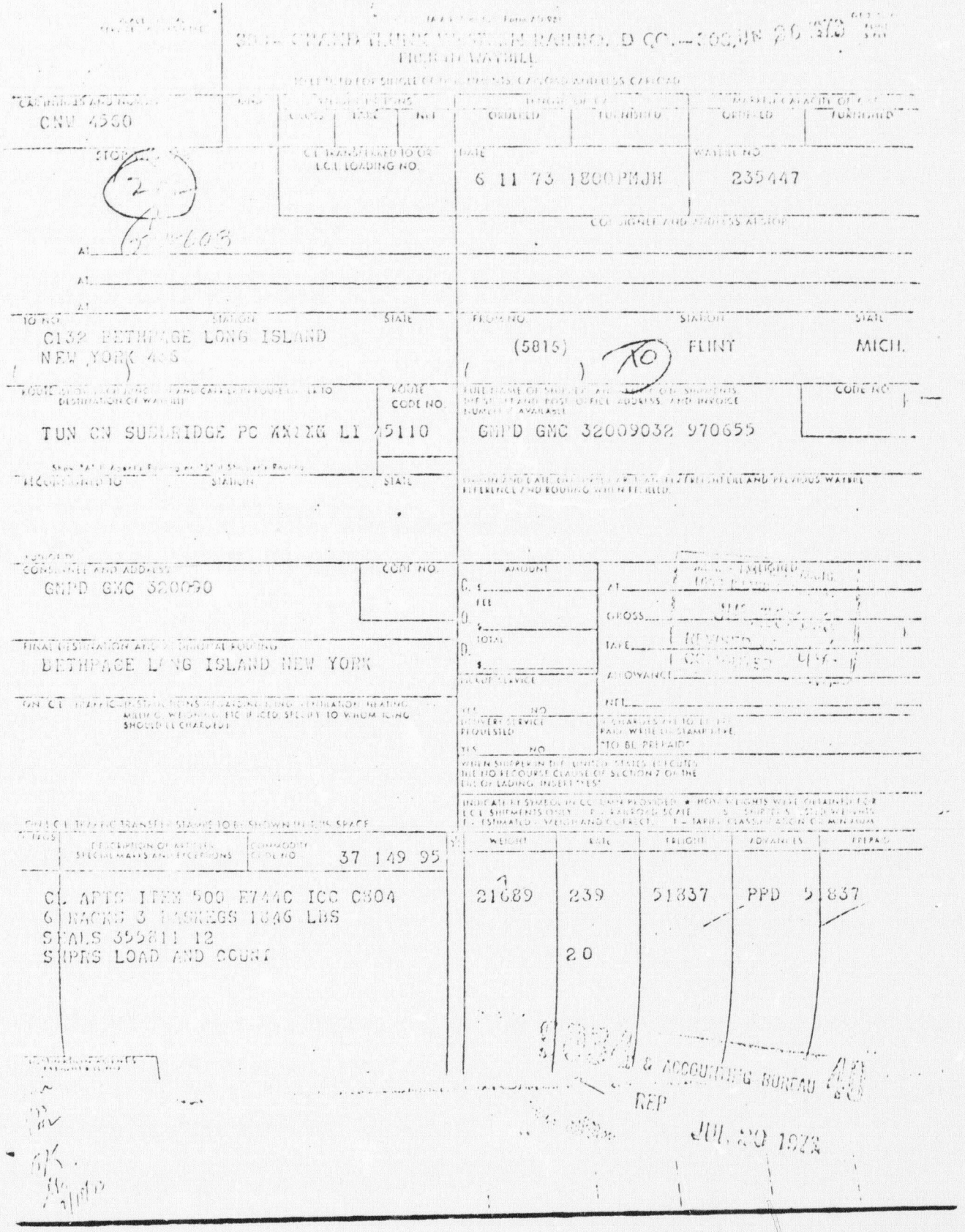


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



CNW 4560

6 11 73 1800 PMJH

235447

C132 BETHPAGE LONG ISLAND
NEW YORK 485

(5815) TO FLINT MICH.

TUN CN SUGARIDGE PC KNIXG LI 15110

GMPD GMC 32009032 970655

GMPD GMC 320090

BETHPAGE LONG ISLAND NEW YORK

37 149 95

CL APTS ITEM 500 E744C ICC C804
6 RACKS 3 TRAILERS 1046 LBS
SEALS 355811 12
SHPRS LOAD AND COUNT

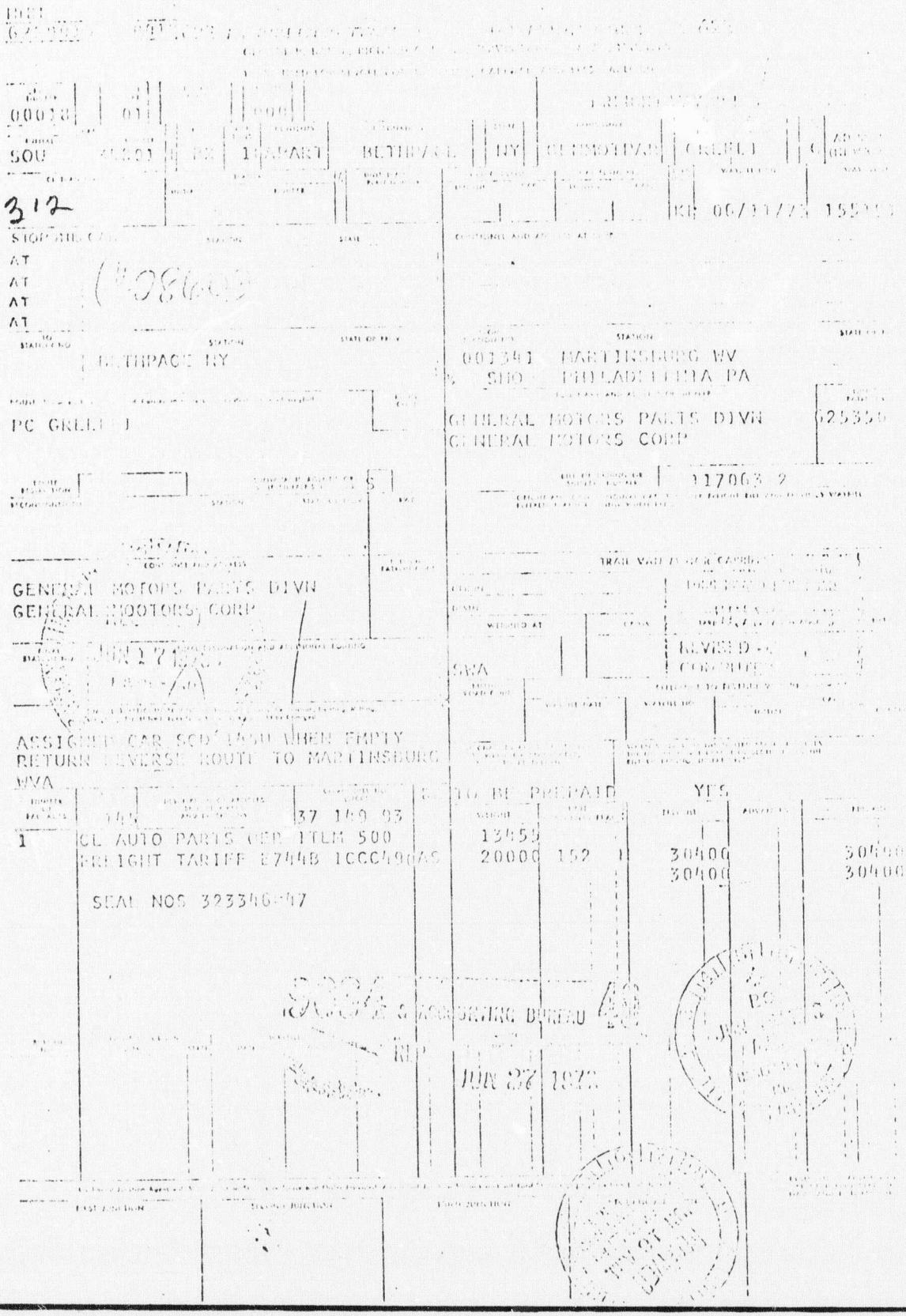
21689 239 51837 PPD 51837

20

REP

JUL 20 1973

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



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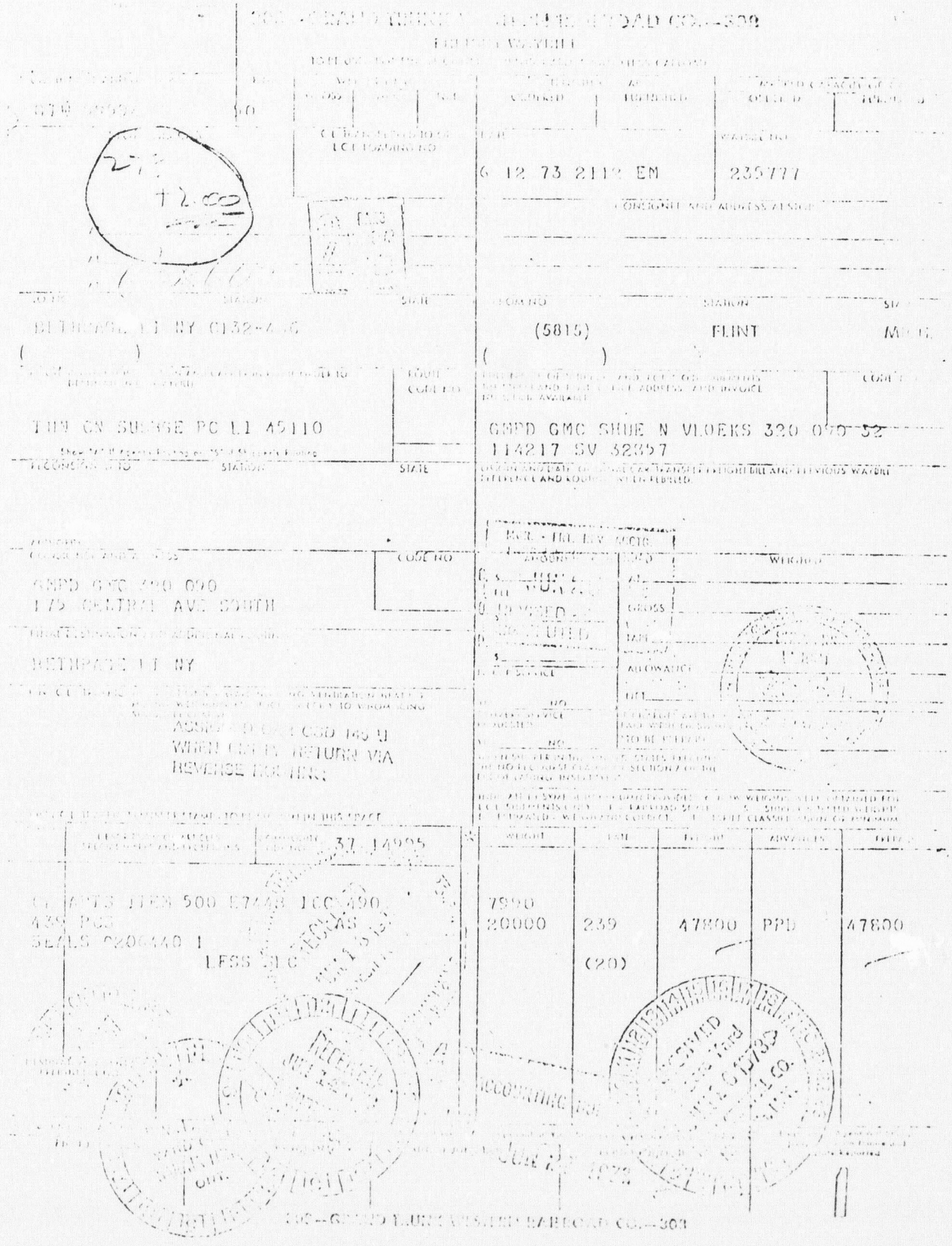

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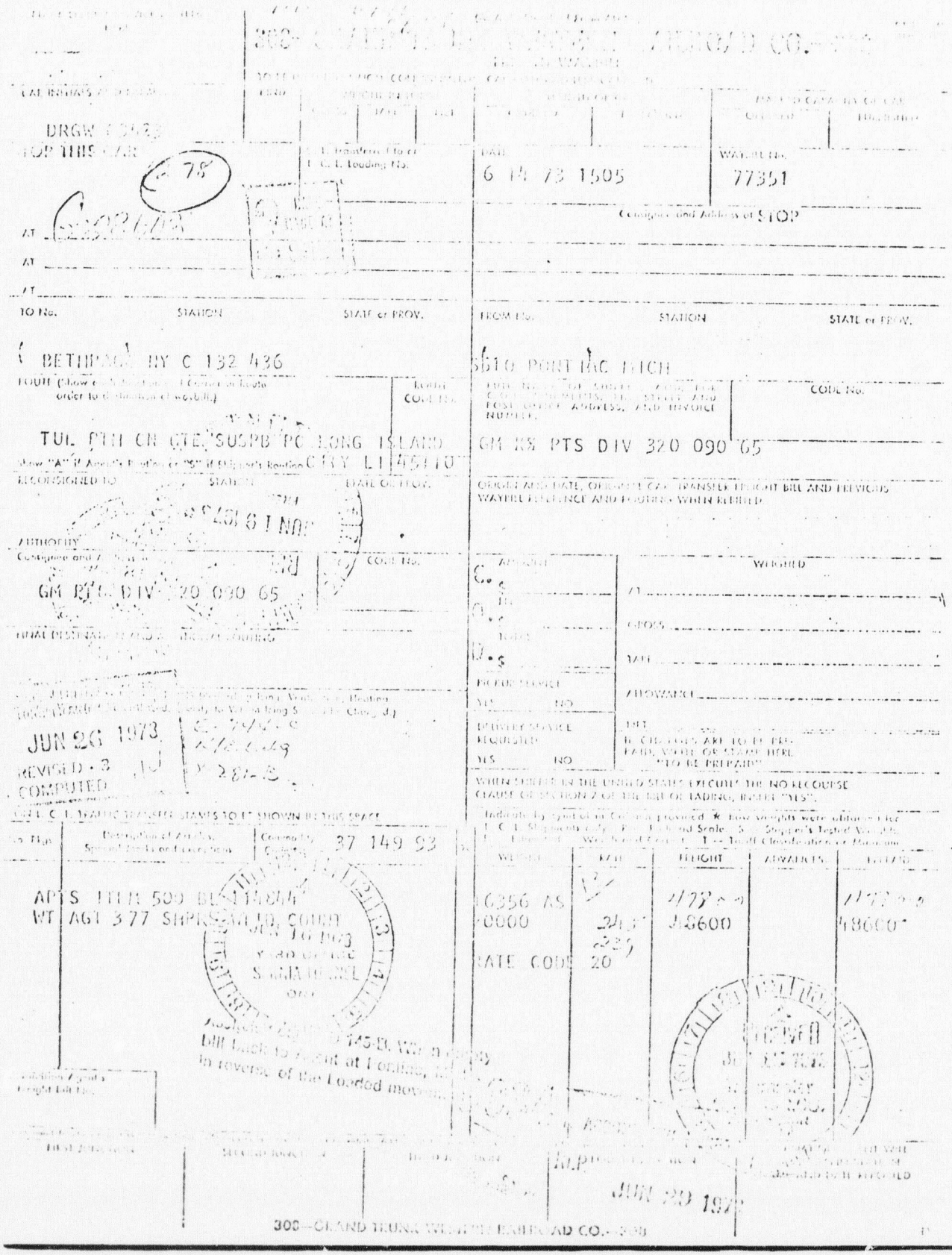

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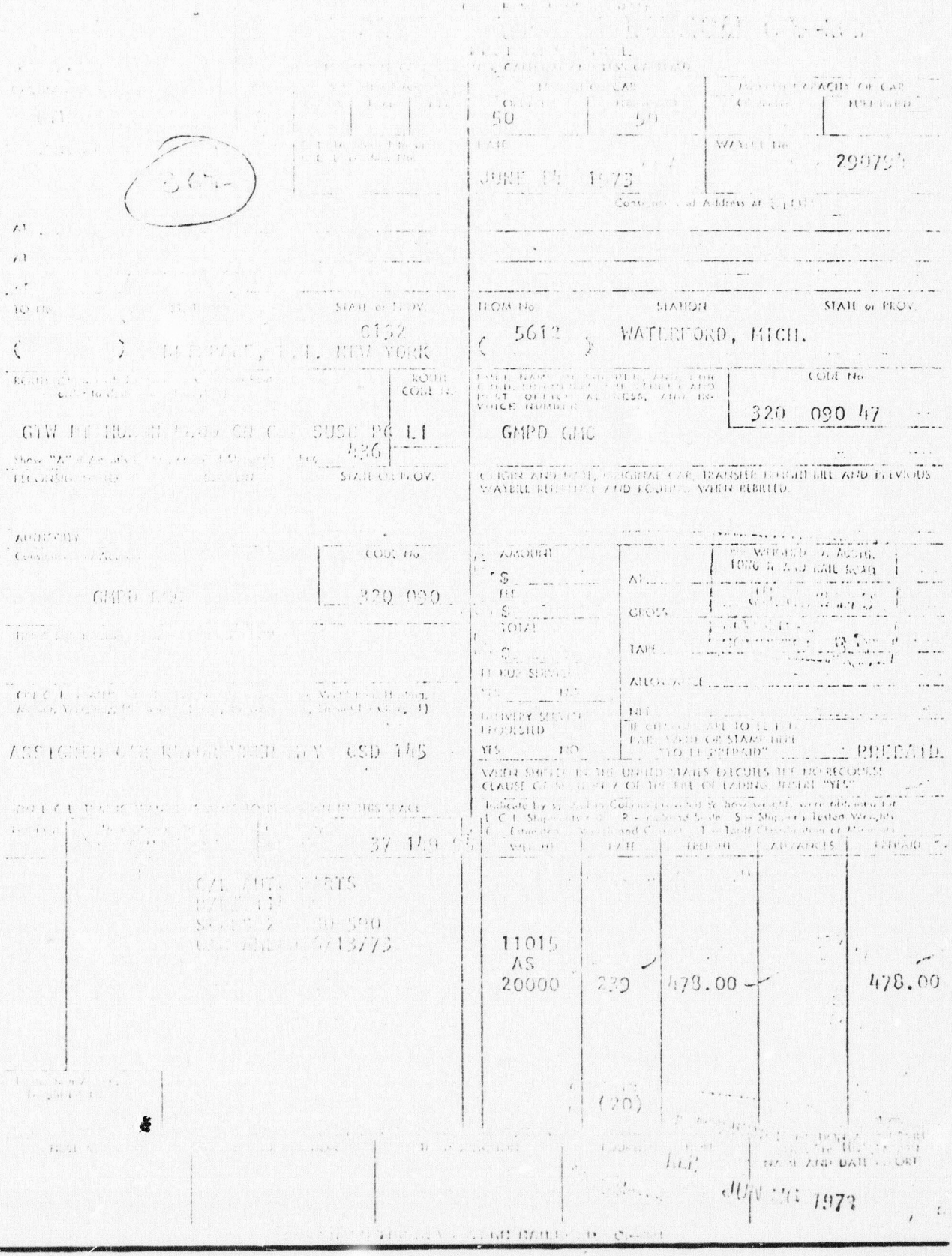


50

JUNE 14 1973

29079

STATE or PROV.

0132

( ) MERRICK, L.I. NEW YORK

FROM No. STATION STATE or PROV.

( 5612 ) WATERFORD, MICH.

ROUTE CODE No.

SUSQ PC LI

436

CODE No.

320 090 47

GMPD GMC

GMW

GMPD GMC

CODE No.

320 090

ASSIGNED CAR NUMBER(S) GIVEN BY CSD 145

37 149

C/L AMT. PARTS

11015
AS
20000

220

478.00

478.00

(20)

JUN 20 1973

**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

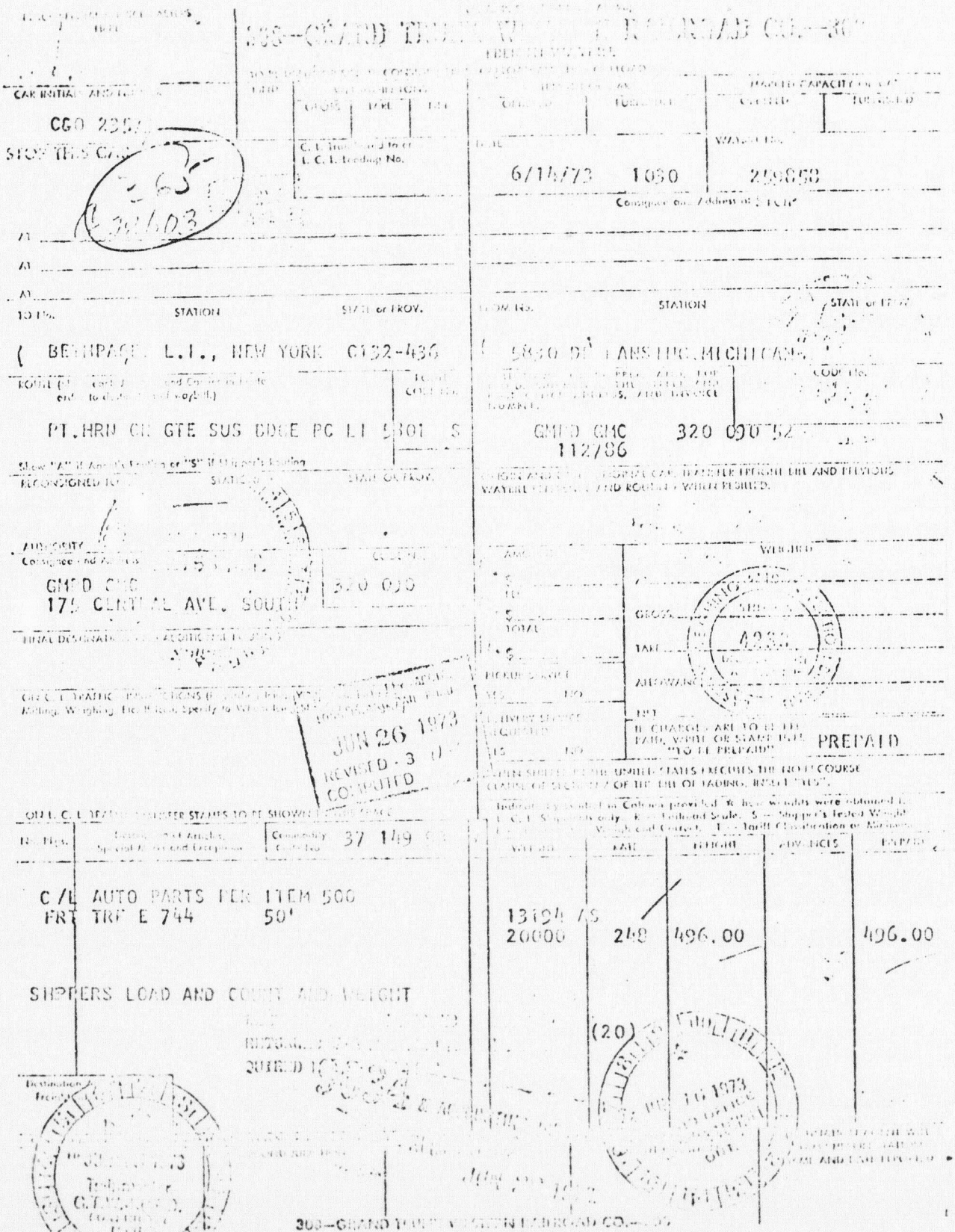
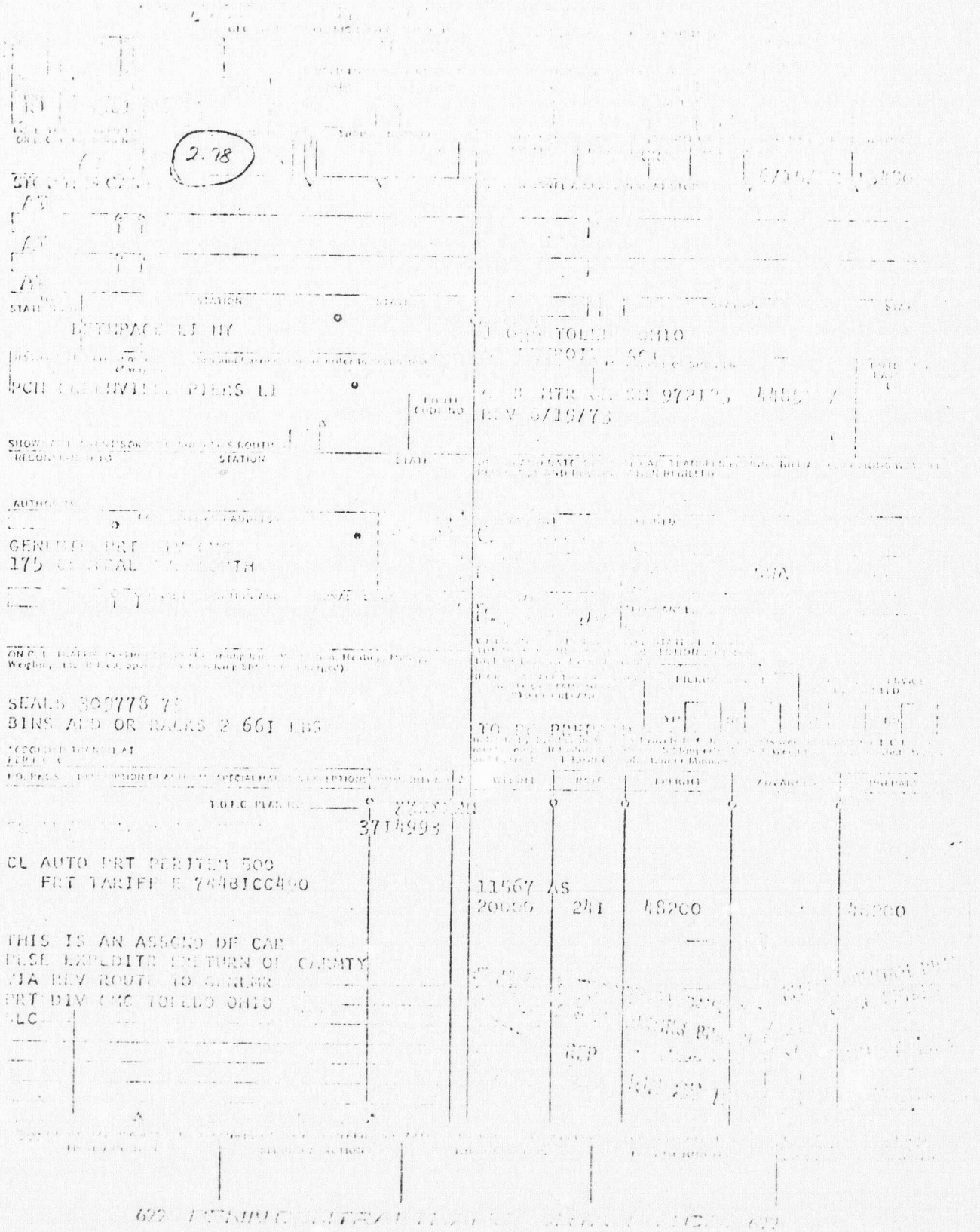


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



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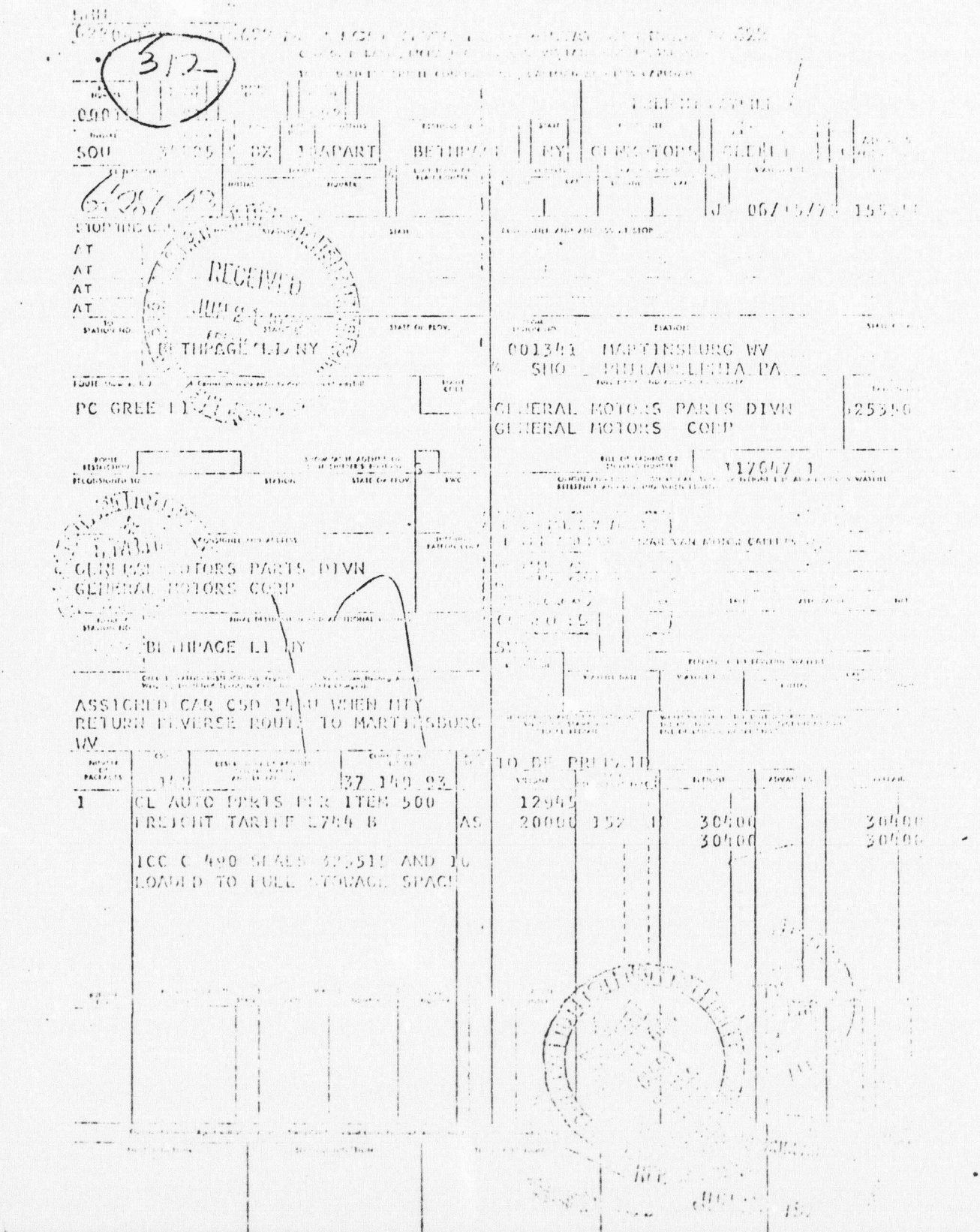
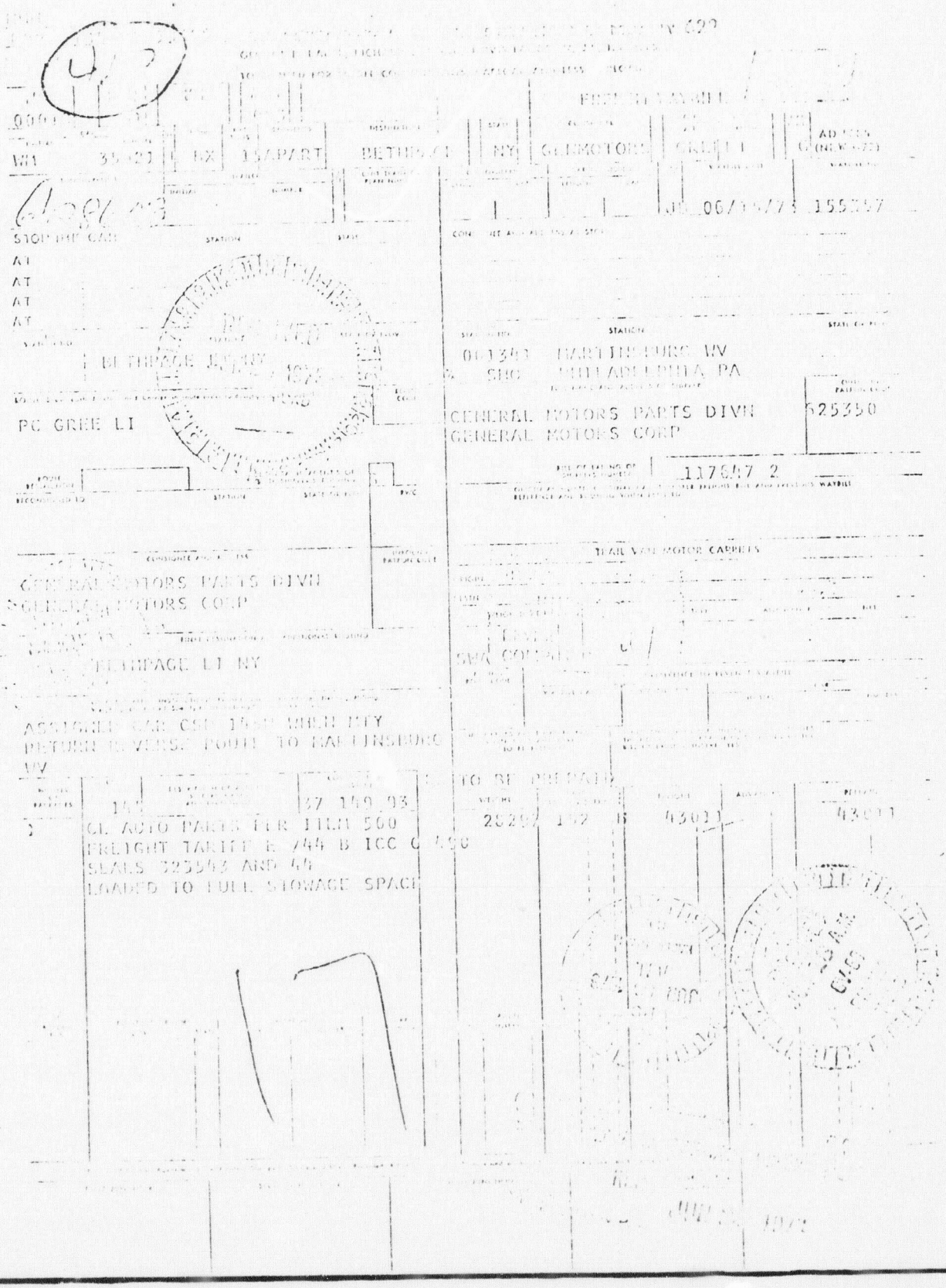


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



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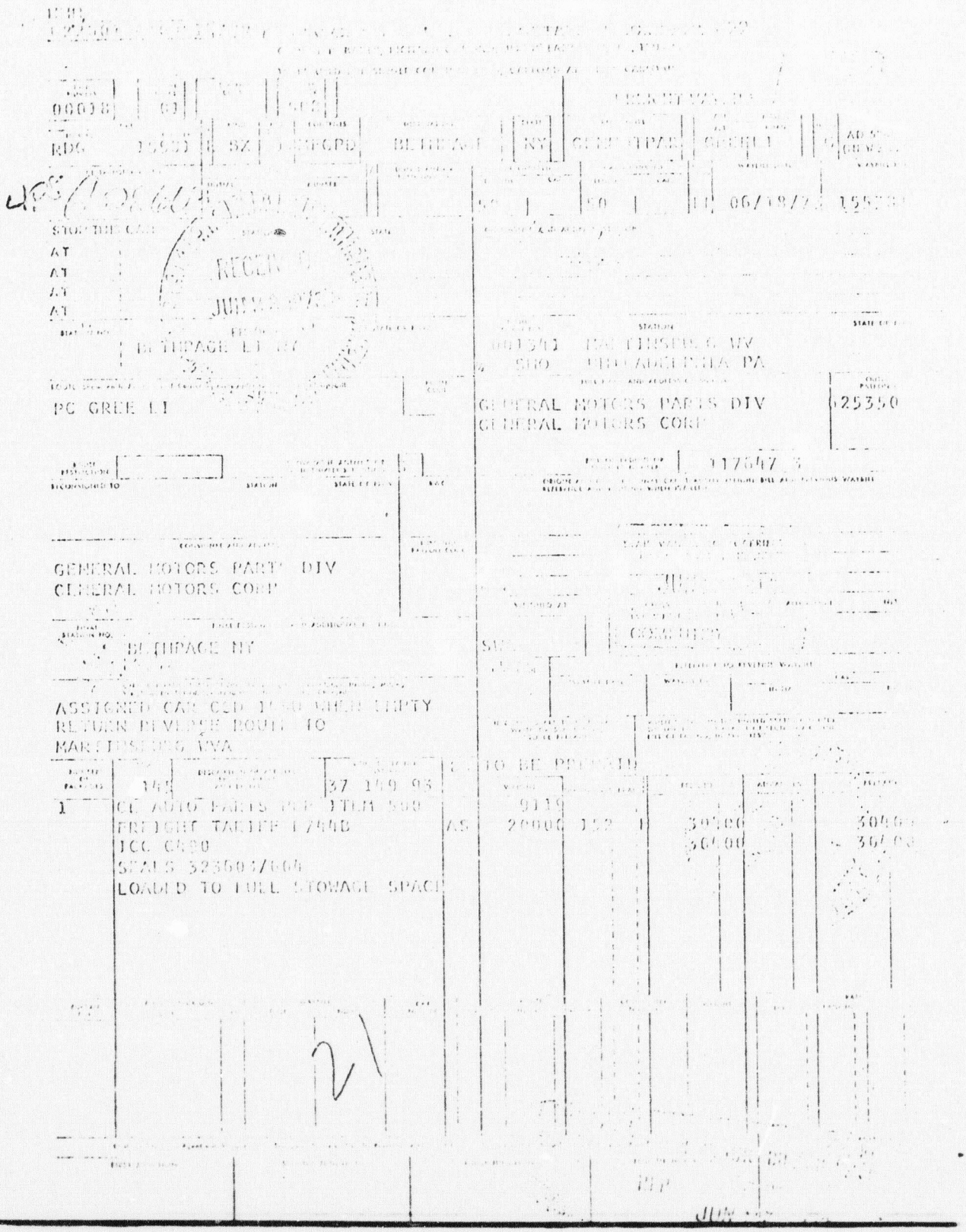
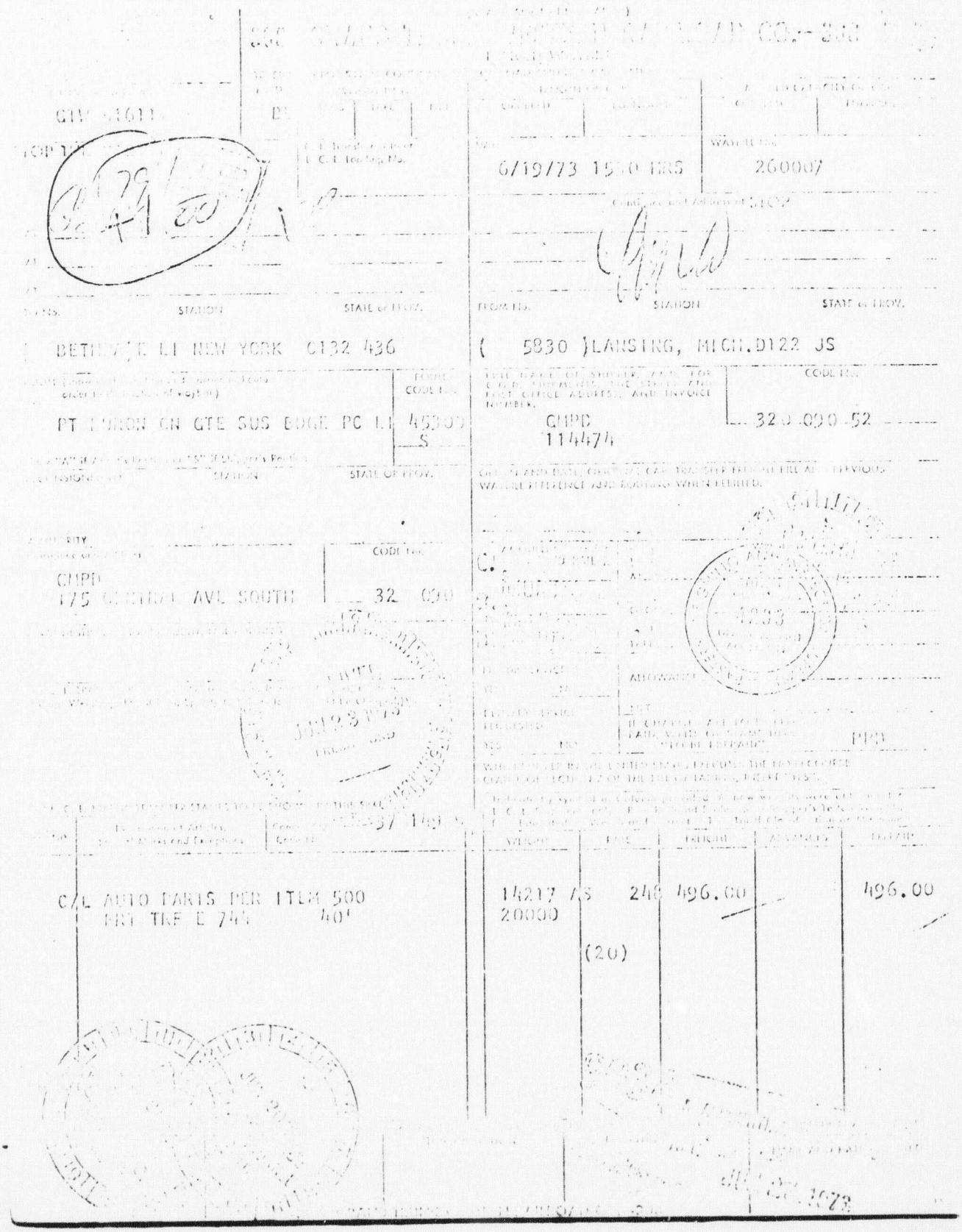


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



6/19/73 1530 HRS

260007

BETHPAGE LI NEW YORK C132 436

( 5830 )LANSING, MICH.D122 JS

PT HURON GN GTE SUS BDGE PC LI 45300 S

CMPD 114474

320 090 52

CMPD 175 CENTRAL AVE SOUTH

32 090

PPD

C/L AUTO PARTS PER ITEM 500 PRT TRF E 744 40'

14217 /S 20000 (20)

248 496.00

496.00

**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

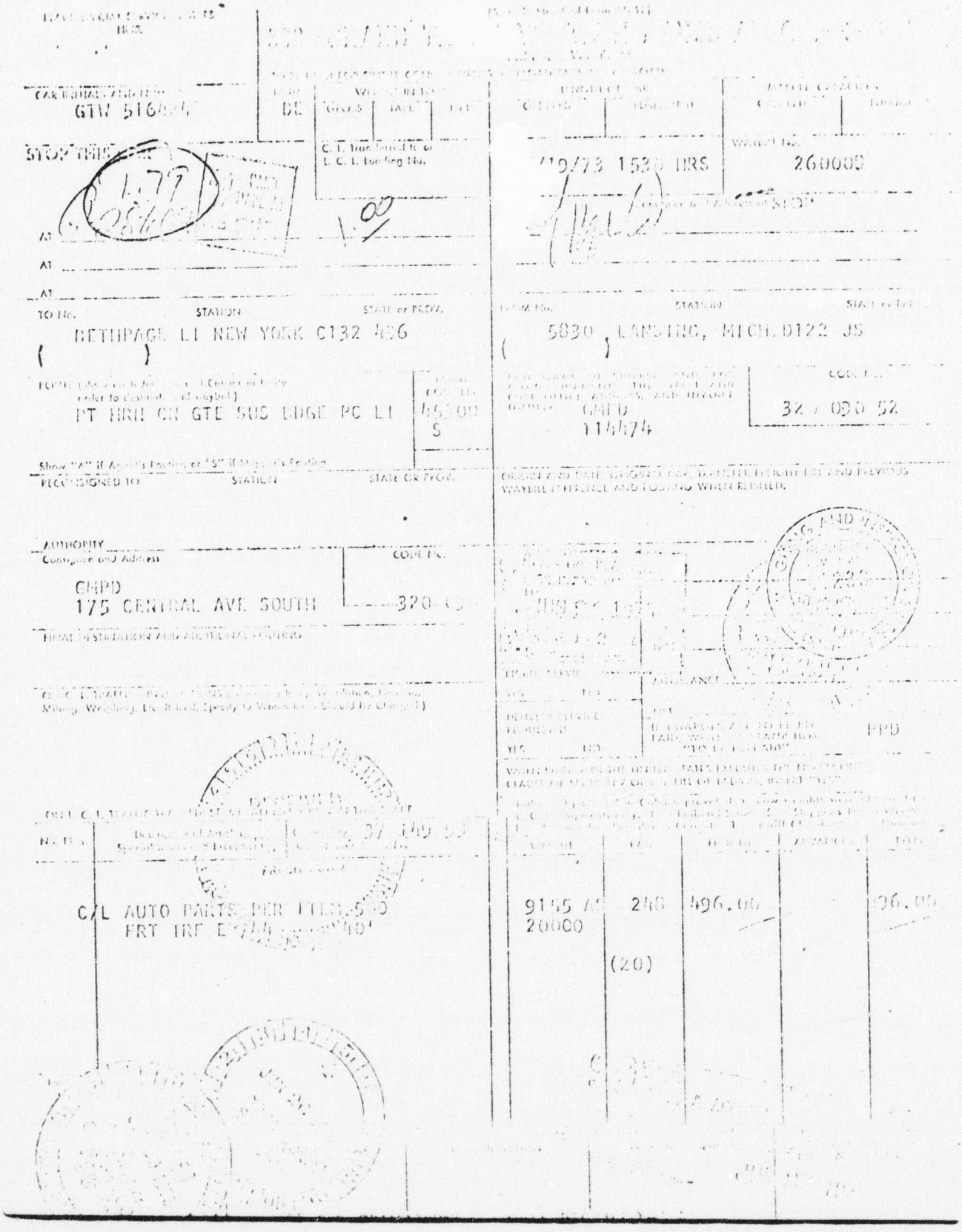


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

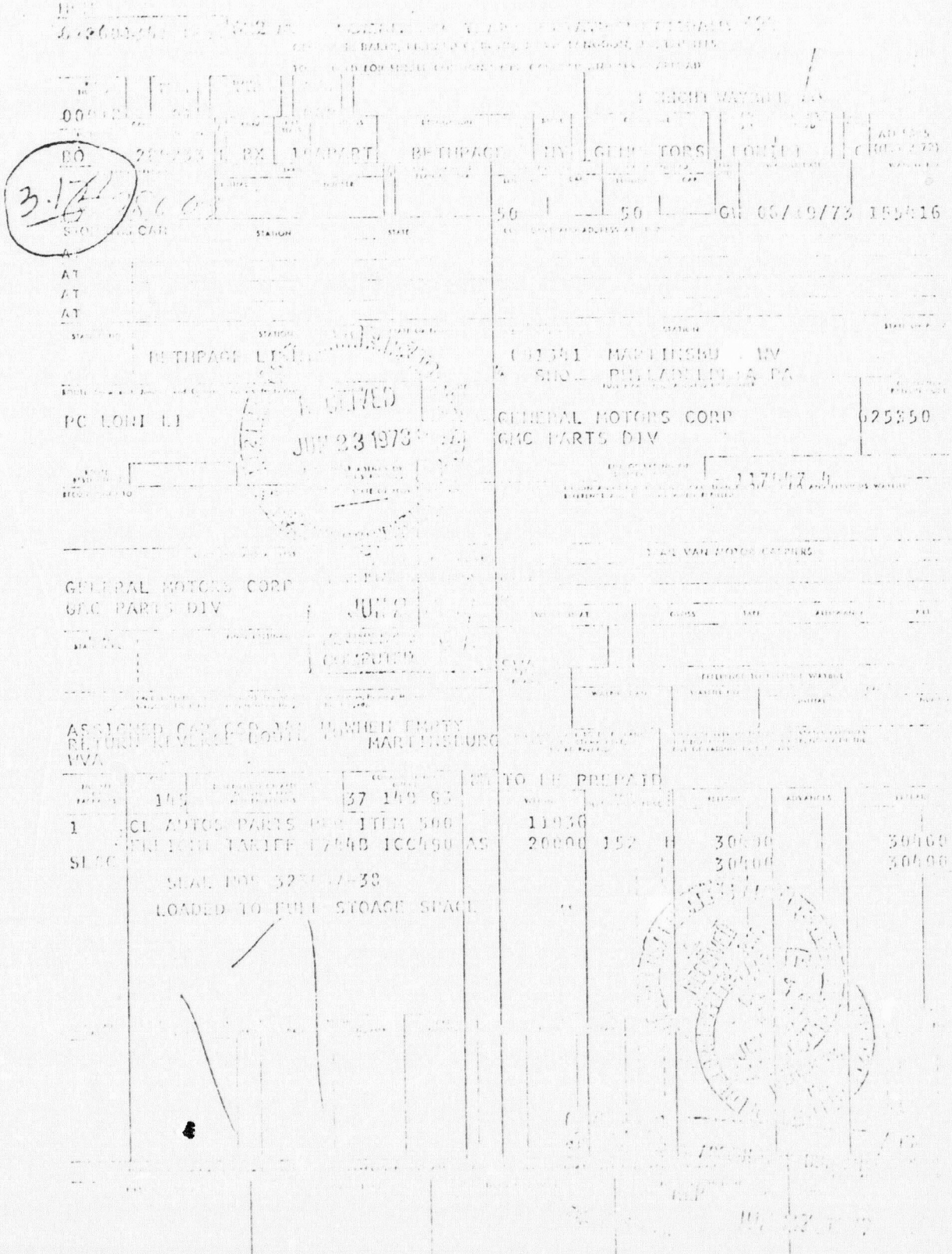


**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

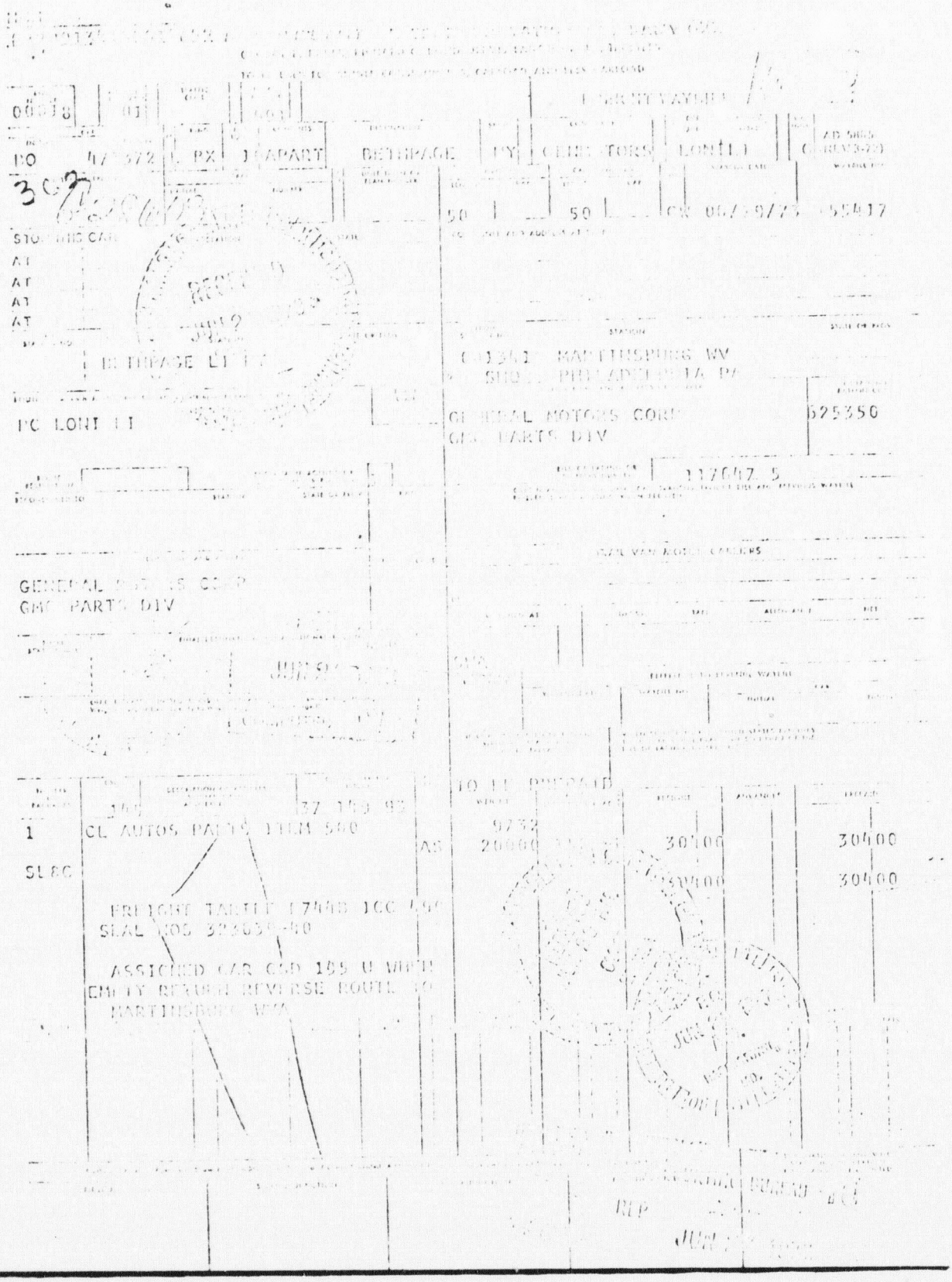


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

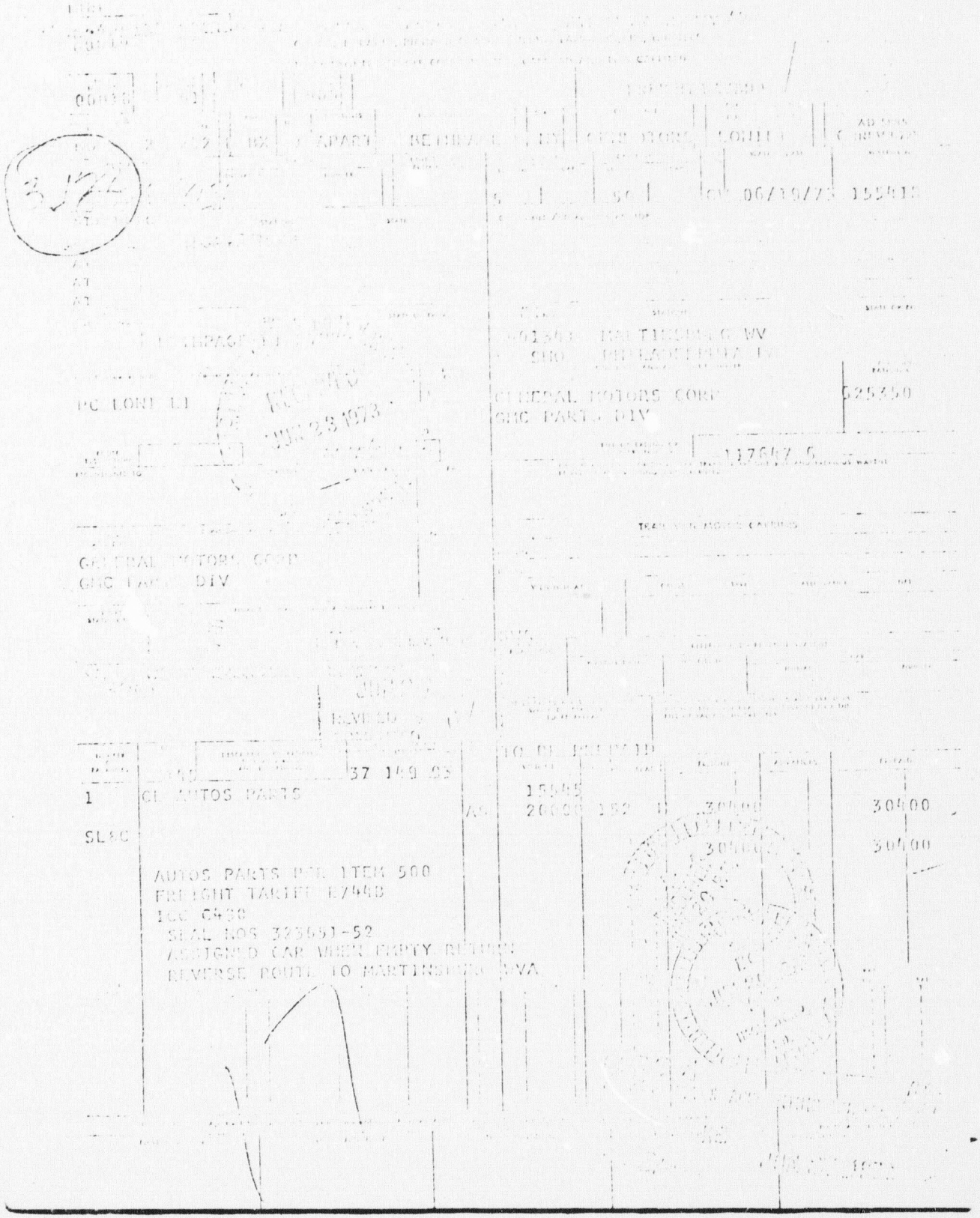


**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

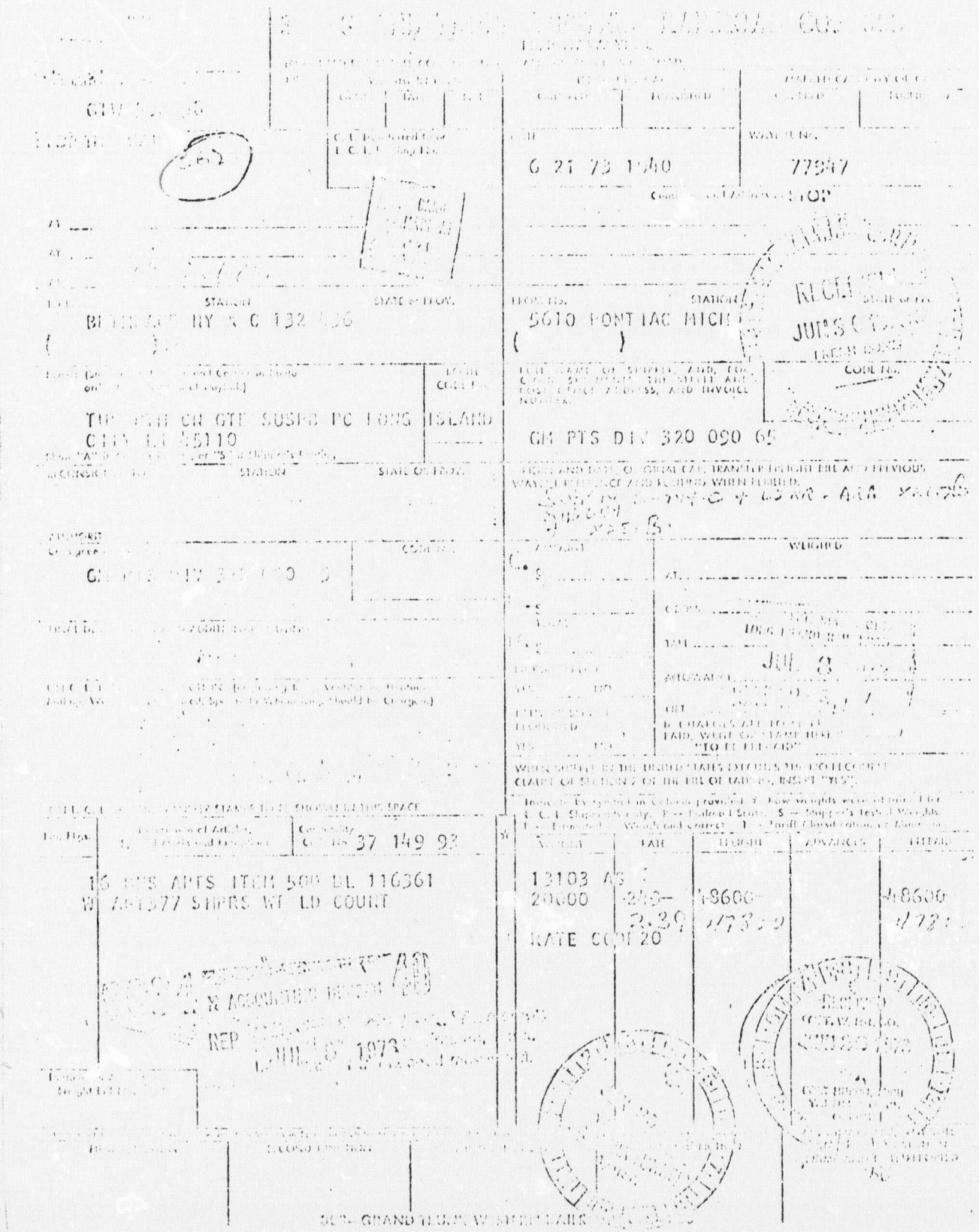


**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

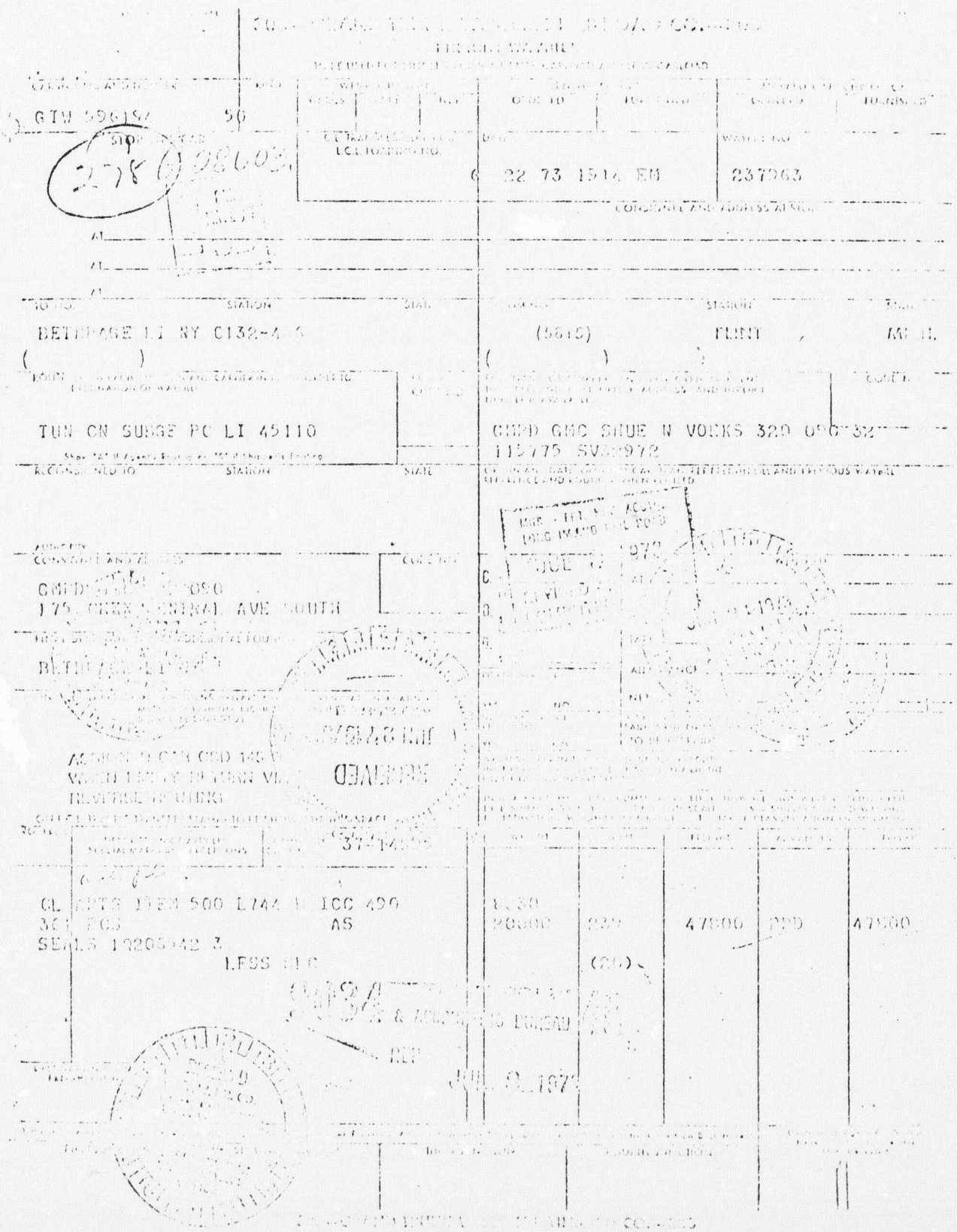


**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

308 GRAND TRUNK WESTERN RAILROAD CO.—308

CAR INITIALS AND EQUIPMENT: CRR 5066

STOP THIS CAR

AT

AT

AT

DATE: 6/23/73 1400

WAYBILL No.: 260153

Consignee and Address of STOP

TO No. STATION STATE or PROV.

( BETHPAGE,L.I., NEW YORK C132-436

FROM No. STATION STATE or PROV.

( 5830 DR LANSING,MICHIGAN

ROUTE (Show each Junction and Carrier in Route order to destination of waybill.)

PT.HRN CN GTE SUSP BDGE PC LI

ROUTE CODE No. 5001 S

Show "A" if Agent's Routing or "S" if Shipper's Routing

RECONSIGNED TO STATION STATE OR PROV.

Released by U.S. Customs
AUTHORITY Suspension Bridge, N.Y.

Consignee and Address

GMPD GMC
175 CENTRAL AVE. SOUTH

CODE No.

FINAL DESTINATION AND ADDITIONAL ROUTING

ON C. L. TRAFFIC—INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Any Specific Services Which Should Be Charged.)

L. I. A. FRT. REV. ACC.
LONG ISLAND RAIL ROAD

JUN 30 1973

JUL 3 1973

ON L. C. L. TRAFFIC TRANSFER STAMPS TO BE SHOWN IN THIS SPACE

FILE NAME OF SHIPPER, AND FOR C.O.D. SHIPMENTS, THE STREET AND POST OFFICE ADDRESS, AND INVOICE NUMBER.

GMPD GMC 116123

CODE No. 320-090-52

ORIGIN AND DATE, ORIGINAL CAR, TRANSFER, DIVERT BILL AND PREVIOUS WAYBILL REFERENCE AND FOREIGN WEIGHT BILL

RECEIVED JUN 28 A.M.

AMOUNT

C. $ FEE

O. $ TOTAL

D. $

PICKUP SERVICE YES NO

DELIVERY SERVICE REQUESTED YES NO

WEIGHTED AT

GROSS

TARE 4233

ALLOWANCE

NET

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID" PREPAID

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE NO RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES".

Indicate by symbol in Column provided * how weights were obtained for L. C. L. Shipments only. R -- Railroad Scale. S -- Shipper's Tested Weights. E -- Estimated -- Weigh and Correct. T -- Tariff Classification or Minimum

| No. Pkgs. | Description of Articles, Special Marks and Exceptions | Commodity Code No. | * | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|
| | C/L AUTO PARTS PER ITEM 500<br>FRT TRF E 744 50'<br><br>SHIPPERS WEIGHT LOAD AND COUNT | 37-149-93 | | 15679<br>20000 | AS<br>248 | 496.00 | | 496.00 |

ACCOUNTING BUREAU

REP.

JUL 5 1973

Destination Agent's Freight Bill No.

Outbound Junction Stamps and Other Remarks. Add Inbound Junction Stamps and all Yard Stamps to be Placed on Back Hereof.

FIRST JUNCTION SECOND JUNCTION THIRD JUNCTION FOURTH JUNCTION

JUN 30 1973 HEAD OFFICE SARNIA ONT.

DESTINATION AGENT WILL STAMP HEREIN STATION NAME AND DATE REPORTED

308—GRAND TRUNK WESTERN RAILROAD CO.—308

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

FINAL

308 GRAND TRUNK WESTERN RAILROAD CO.—308

FREIGHT WAYBILL

| CAR INITIAL AND NUMBER | KIND | WEIGHT IN POUNDS GROSS | TARE | NET | LENGTH OF CAR ORDERED | LENGTH OF CAR FURNISHED | MARKED CAPACITY OF CAR ORDERED | MARKED CAPACITY OF CAR FURNISHED |
|---|---|---|---|---|---|---|---|---|
| UP 554013 | | | | | | | | |

STOP THIS CAR

C. L. Transferred From or L. C. L. Loading No.

DATE 6/23/73 1400

WAYBILL NO. 260163

AT

AT

Consignee and Address of STOP

| TO No. | STATION | STATE or PROV. | FROM No. | STATION | STATE or PROV. |
|---|---|---|---|---|---|
| ( ) | BETHPAGE, L.I., | NEW YORK C132-436 | ( ) | 5830 DB LANSING, | MICHIGAN |

ROUTE (Show each Junction and Carrier in Route order to Destination or way-bill)

PT.HRN CN-GTE SUSP/DUGE PC L

ROUTE CODE No. 5801 S

Show "A" if Agent's Routing or "S" if Shipper's Routing

FULL NAME OF SHIPPER, AND, FOR C.O.D. SHIPMENTS, THE STREET AND POST OFFICE ADDRESS, AND INVOICE NUMBER.

GMPD GMC
116123

CODE No. 320 090 52

RECONSIGNED TO STATION STATE OR PROV.

JUN 28 1973

ORIGINAL AND DATE OF ORIGINAL CAR TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL REFERENCE AND STATIONS WHEN REBILLED.

LIRR INWARD FREIGHT
JUL 16 1973

AUTHORITY

Consignee and Address
GMPD GMC
175 CENTRAL AVE. SOUTH

CODE No. 320 090

AMOUNT C. $ REVISED COMPUTED AT

WEIGHED AT

O. $

TOTAL D. $

GROSS

TARE

ALLOWANCE

NET

FINAL DESTINATION AND ADDITIONAL ROUTING

JUN 24 1973
YARD OFFICE

PICKUP SERVICE YES NO

DELIVERY SERVICE REQUESTED YES NO

ON L. C. L. TRAFFIC—INSTRUCTIONS (Routing, Diversion, Reconsignment, Stopping in Transit for Milling, Weighing, Etc. If Iced, Specify Top Icing Charges Collect or Prepaid)

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID" PREPAID

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE NO-RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES".

ON L. C. L. TRAFFIC TRANSFER STAMPS TO BE SHOWN IN THIS SPACE

Indicate by symbol in Column provided ★ how weights were obtained for L. C. L. Shipments only. R — Railroad Scale. S — Shipper's Tested Weights. E — Estimated — Weigh and Correct. T — Tariff Classification or Minimum.

| No. Pkgs. | Description of Articles, Special Marks and Exceptions | Commodity Code No 37 149 93 | ★ | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|
| | C/L. AUTO PARTS PER ITEM 500 | | | | | | | |
| | FRT TRF E 744 50' | | | 14231 | AS | | | |
| | | | | 20000 | 248 | 496.00 | | 496.00 |
| | SHIPPERS WEIGHT LOAD AND COUNT | | | | | | | |
| | | | | | (20) | | | |
| | [illegible] | | | | | | | |

Destination Agent's Freight Bill No.

RECEIVED
JUN 24 1973
A.M.
PORT HURON, MICH.
YARDMASTER'S OFFICE

Shipper's Weight and Order Provided. Additional Junction Stamps and all Yard Stamps to Be Entered Hereon.

SECOND JUNCTION THIRD JUNCTION FOURTH JUNCTION

DESTINATION AGENT W. L. STAMP HEREIN STATION NAME AND DATE REPORTED JUL 19 1973

308—GRAND TRUNK WESTERN RAILROAD CO.—308

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

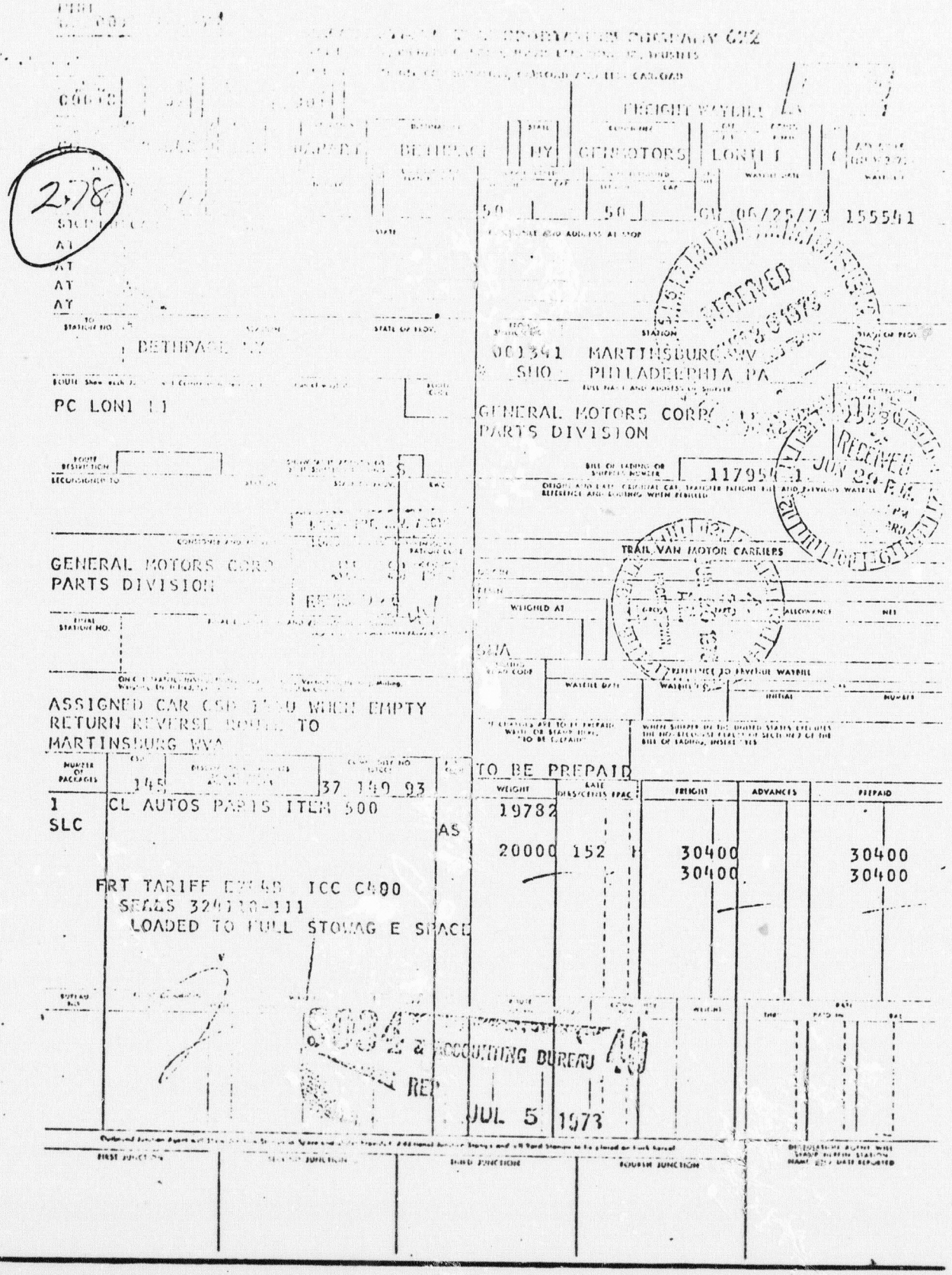
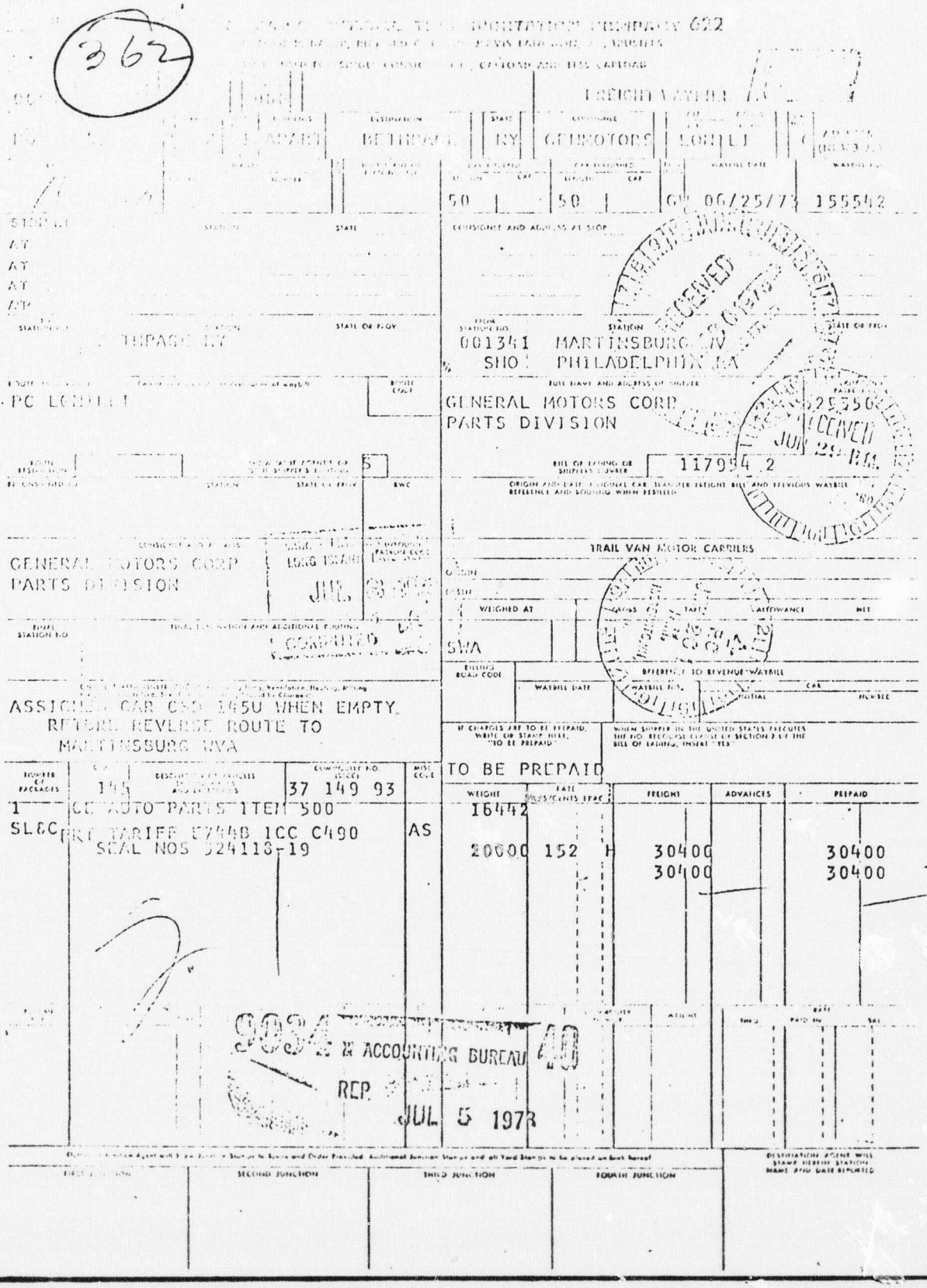


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



362

FREIGHT WAYBILL

ARZR | BETHPAGE | NY | GEMOTORS | LORILI

50 | 50 | 06/25/73 | 155542

STOP AT
AT
AT
AT
AT

STATION | STATE

BETHPAGE NY

CONSIGNEE AND ADDRESS AT STOP

FROM STATION NO. 001341 | STATION | STATE OR PROV.
MARTINSBURG WV
SHOT PHILADELPHIA PA

ROUTE OF CAR
PC LORILI

FULL NAME AND ADDRESS OF SHIPPER
GENERAL MOTORS CORP
PARTS DIVISION

BILL OF LADING OR SHIPPER'S COVER 117954 2

ORIGIN AND DATE OF ORIGINAL CAR, TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL REFERENCE AND ROUTING WHEN REBILLED

TRAIL VAN MOTOR CARRIERS

CONSIGNED TO
GENERAL MOTORS CORP
PARTS DIVISION

LOAD | EMPTY

JUL 03

DESTINATION AND ADDITIONAL ROUTING
CONSIGNED

WEIGHED AT | GROSS | TARE | ALLOWANCE | NET

SWA

BILLING ROAD CODE | REFERENCE TO REVENUE WAYBILL
WAYBILL DATE | WAYBILL NO. | INITIAL | CAR NUMBER

ASSIGNED CAR CSO 1450 WHEN EMPTY
RETURN REVERSE ROUTE TO
MARTINSBURG WVA

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE, "TO BE PREPAID"

WHEN SHIPPER OF THE UNITED STATES EXECUTES THE NO RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES"

TO BE PREPAID

| NUMBER OF PACKAGES | CL | DESCRIPTION OF ARTICLES AND SPECIAL MARKS | COMMODITY NO. (DOT) | MISC. CODE | WEIGHT | RATE (CLASS OR CENTS PER CWT) | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 145 | CC AUTO PARTS ITEM 500 | 37 149 93 | | 16442 | | | | |
| SL&C | | PRT TARIFF 6748B ICC C490 | | AS | | | | | |
| | | SEAL NOS 524118-19 | | | 20000 | 152 H | 30400 | | 30400 |
| | | | | | | | 30400 | | 30400 |

9054 ACCOUNTING BUREAU
REP
JUL 5 1973

DESTINATION AGENT WILL STAMP HEREIN STATION NAME AND DATE REPORTED

FIRST JUNCTION | SECOND JUNCTION | THIRD JUNCTION | FOURTH JUNCTION

## EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

HHH

6270013410601 622 PENN CENTRAL TRANSPORTATION COMPANY 622

GEORGE P. BAKER, RICHARD C. [illegible], JERVIS LANGDON, JR., TRUSTEES

TO BE USED FOR SINGLE CONSIGNMENT, CARLOAD AND LESS CARLOAD

FREIGHT WAYBILL

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 00018 | 01 | | 002 | | | | | | | |
| BO 289067 | L | BX | | MFGPD | BETHPAGE | NY | GENMOTORS | GREELI | | |

6-2840 312

50 50 FR 06/26/73 155595

STOP THIS CAR AT STATION STATE

AT

AT

AT

AT

TO STATION NO. 001341 STATION BETHPAGE LI STATE OF PROV NY

FROM STATION NO. 001341 STATION MARTINSBURG STATE OF PROV WV

SHO PHILADELPHIA PA

ROUTE Show each Junction and Carrier in route order to destination of waybill

PC GREE LI

ROUTE CODE

CONSIGNEE AND ADDRESS

GENERAL MOTORS CORP
GENERAL MOTORS PARTS DIV

FULL NAME AND ADDRESS OF SHIPPER

GENERAL MOTORS PARTS DIV
GENERAL MOTORS CORP

CONSIGNOR PATRON CODE 625350

ROUTE DESTINATION

RECONSIGNED TO STATION STATE OR PROV

SHOW "AT" IF AGENT'S OR "X" IF SHIPPER'S BOXCAR

BILL OF LADING OR SHIPPER'S NUMBER 117954 5

ORIGIN AND DATE OF ORIGINAL TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL REFERENCE AUTHORIZED

CONSIGNEE PATRON CODE

FINAL STATION NO. FINAL DESTINATION AND ADDITIONAL ROUTING

BETHPAGE LI NY

SWA

ORIGIN

DESTINATION

WEIGHED AT

BILLING ROAD CODE

REFERENCE TO REVENUE WAYBILL

WAYBILL DATE WAYBILL NO. INITIAL

ON C. I. TRAFFIC INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Used, Specify by Whom Iced or Charged)

ASSIGNED CAR CSD 145U WHEN EMPTY
RETURN REVERSE ROUTE TO
MARTINSBURG WV

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE, "TO BE PREPAID"

TO BE PREPAID

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE N.R. RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES"

| NUMBER OF PACKAGES | CSD | DESCRIPTION OF ARTICLES SPECIAL MARKS AND EXCEPTIONS | COMMODITY NO. (STCC) | MISC. CODE | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 145 | CL AUTOS PARTS PER ITEM 500 | 37 149 93 | | 10500 | | | | |
| | | FRT TARIFF E7448 ICC C 490 | | AS | 20000 | 152 | 30400 | | 30400 |
| | | SEALS 324148 49 | | | | | 30400 | | 30400 |
| | | LOADED TO FULL STOWAGE SPACE | | | | | | | |

RECEIVED JUL 2 1973 FRESH POND

RECEIVED JUL 5 1973 MGR. LONG ISLAND RAIL

RECEIVED JUL 9 1973 TRUCK MOTOR CARRIERS

RECEIVED JUL 9 1973 FREIGHT AUDIT & ACCOUNTING BUREAU REP.

Outbound Junction Agent will Show Junction Stamps in Space and Order Provided. Additional Junction Stamps and all Yard Stamps to be placed on Lock Reverse

| FIRST JUNCTION | SECOND JUNCTION | THIRD JUNCTION | FOURTH JUNCTION |
|---|---|---|---|
| | | | |

DESTINATION & JOINT WISE STAMP HEREIN STATING NAME AND DATE REPORTED

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

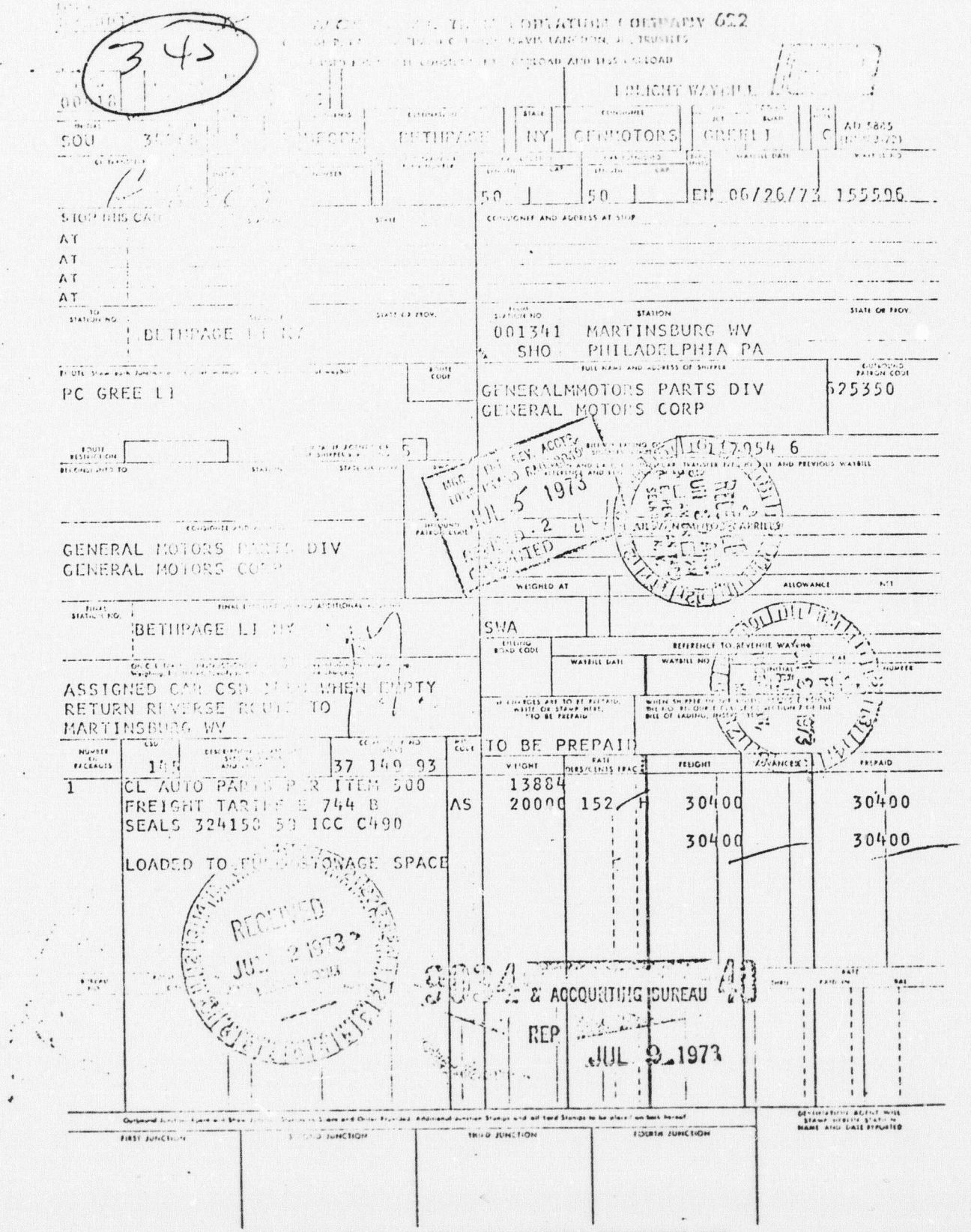


**EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR**

PLACE SPECIAL SERVICE PASTES HERE

(A. A. R. Standard Form AD 201)

308—GRAND TRUNK WESTERN RAILROAD CO.—308

FREIGHT WAYBILL

TO BE USED FOR SINGLE CONSIGNMENTS, CARLOAD AND LESS CARLOAD

| CAR INITIALS AND NUMBER | KIND | WEIGHT IN TONS: GROSS | TARE | NET | LENGTH OF CAR: ORDERED | FURNISHED | MARKED CAPACITY OF CAR: ORDERED | FURNISHED |
|---|---|---|---|---|---|---|---|---|
| GTW 595060 | B | | | | 50 | 50 | | |

STOP THIS CAR 155

C. L. Transferred to or L. C. L. Loading No.

DATE JUNE 27 1973

WAYBILL No. 290917

AT

AT

AT

AT

Consignee and Address at STOP

| TO No. | STATION | STATE or PROV. | FROM No. | STATION | STATE or PROV |
|---|---|---|---|---|---|
| ( ) | BETHPAGE, L.I. | NEW YORK 8132 | ( 5612 ) | WATERFORD, MICH. | |

ROUTE (Show each Junction and Carrier in Route order to destination of waybill)

5800
GTW PT HURON CN GTE SUSB PC LI 436

ROUTE CODE No.

Show "A" if Agent's Routing or "S" if Shipper's Routing

FULL NAME OF SHIPPER, AND, FOR C.O.D. SHIPMENT, THE STREET AND POST OFFICE ADDRESS, AND INVOICE NUMBER

GMPD GMC

CODE No. 320 00 47

RECONSIGNED TO STATION STATE OR PROV.

AUTHORITY

ORIGIN AND DATE ORIGINAL CAR, TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL REFERENCE AND ROUTING WHEN REBILLED.

Consignee and Address

GMPD GMC

CODE No. 320 090

C. S. AMOUNT

D. S. FEE

D. S. TOTAL

WEIGHED

AT

GROSS

TARE

ALLOWANCE

NET

JUL 6 REVISED - 5

PICKUP SERVICE YES NO

DELIVERY SERVICE REQUESTED YES NO

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID" PREPAID

FINAL DESTINATION AND ADDITIONAL ROUTING

ON C. L. TRAFFIC – INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

XXX ASSIGNED CAR RETURN WHEN MTY CSD 145

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE NO-RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES".

ON L. C. L. TRAFFIC TRANSFER STAMPS TO BE SHOWN IN THIS SPACE

Indicate by symbol in Column provided ★ how weights were obtained for L. C. L. Shipments only R – Railroad Scale S – Shipper's Tested Weights E – Estimated – Weigh and Correct T – Tariff Classification or Minimum

| No. Pkgs | Description of Articles, Special Marks and Exceptions | Commodity Code No. | ★ | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|
| | C/L AUTO PARTS<br>B/L# 116994<br>SEALS 250617-618<br>CAR AHEAD 6/26/73 | 37 149 95 | | 15111<br>AS<br>20000 | 239 | 478.00 | | 478.00 |

3934 & ACCOUNTING BUREAU

REP

JUL 9 1973

(20)

Destination Agent's Freight Bill No.

| FIRST JUNCTION | SECOND JUNCTION | THIRD JUNCTION | FOURTH JUNCTION |
|---|---|---|---|
| | | | |

DESTINATION AGENT WILL STAMP HEREIN STATION NAME AND DATE RECEIVED

308—GRAND TRUNK WESTERN RAILROAD CO.—308

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

303- GRAND TRUNK WESTERN RAILROAD CO.--303

FREIGHT WAYBILL

6/28/73 1030 260282

STOP OFF AT

AT

AT

FROM No. STATION STATE OF FROM

( BETHPAGE, L.I., NEW YORK C132-436 )

TO No. STATION STATE OF TO

( 5330 DB LANSING, MICHIGAN )

PT. HRN CN GTE SUSP BDGE PC LI 0801 S

CONSIGNEE AND ADDRESS, TOP LINE—NUMBER, THE STREET AND POST OFFICE ADDRESS, AND RR OFFICE NUMBER

GMPD GMC
117531

CODE No.

320 090 52

RECONSIGNED TO STATION STATE OF FROM

CREDIT AND DATE, ORIGINAL CAR, TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL REFERENCE AND ROUTING WHEN REBILLED.

AUTHORITY

Consignee and Address

GMPD
175 CENTRAL AVE. SOUTH

FINAL DESTINATION AND ADDRESS

ON C. L. TARIFF INSTRUCTIONS (Routing, Rate, Reconsign, Reroute, Mileage, Weighing, Declared, Specify; Custom Seal and Ex Charges)

RECEIVED
JUL 30 1973
GMPD

ON C. L. TRAFFIC TRANSFER STATION TO BE SHOWN IN THIS SPACE

ACCOUNT

WEIGHED

DELIVERY SERVICE REQUESTED YES NO

IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID" PREPAID

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE NO RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES".

Indicate by symbol in Column provided ★ how weights were obtained: C. L. C. L. Shipments only. R — Railroad Scale. S — Shipper's Tested Weights. E — Estimated — Weigh and Correct. T — Tariff Classification or Minimum.

| No. Pkgs. | Description of Articles, Special Marks and Exceptions | Commodity Code No. | ★ | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|
| | C/L AUTO PARTS PER ITEM 500<br>FRT TRF E 744 50' | 37 149 93 | | 17500 AS<br>20000 | 248 | 496.00 | | 496.00 |
| | SHIPPERS WEIGHT LOAD AND COUNT | | | | (20) | | | |

RECEIVED
GTW RR CO.
JUL 30 1973

Destination Agent's Freight Bill No.

RECEIVED
JUL 30 1973
GTW RR CO.

REP

JUL 12 1973

303 - GRAND TRUNK WESTERN RAILROAD CO.—303

EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

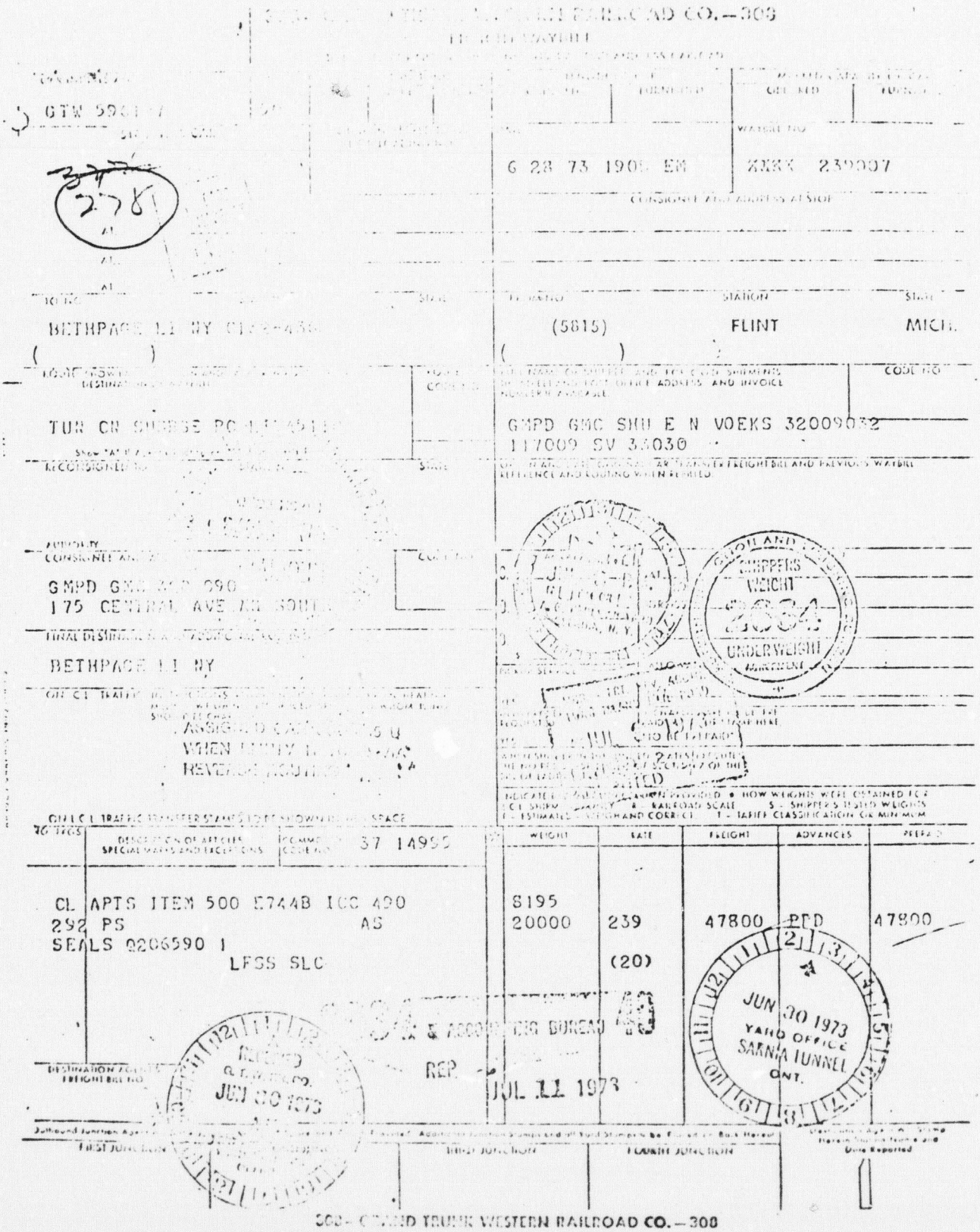
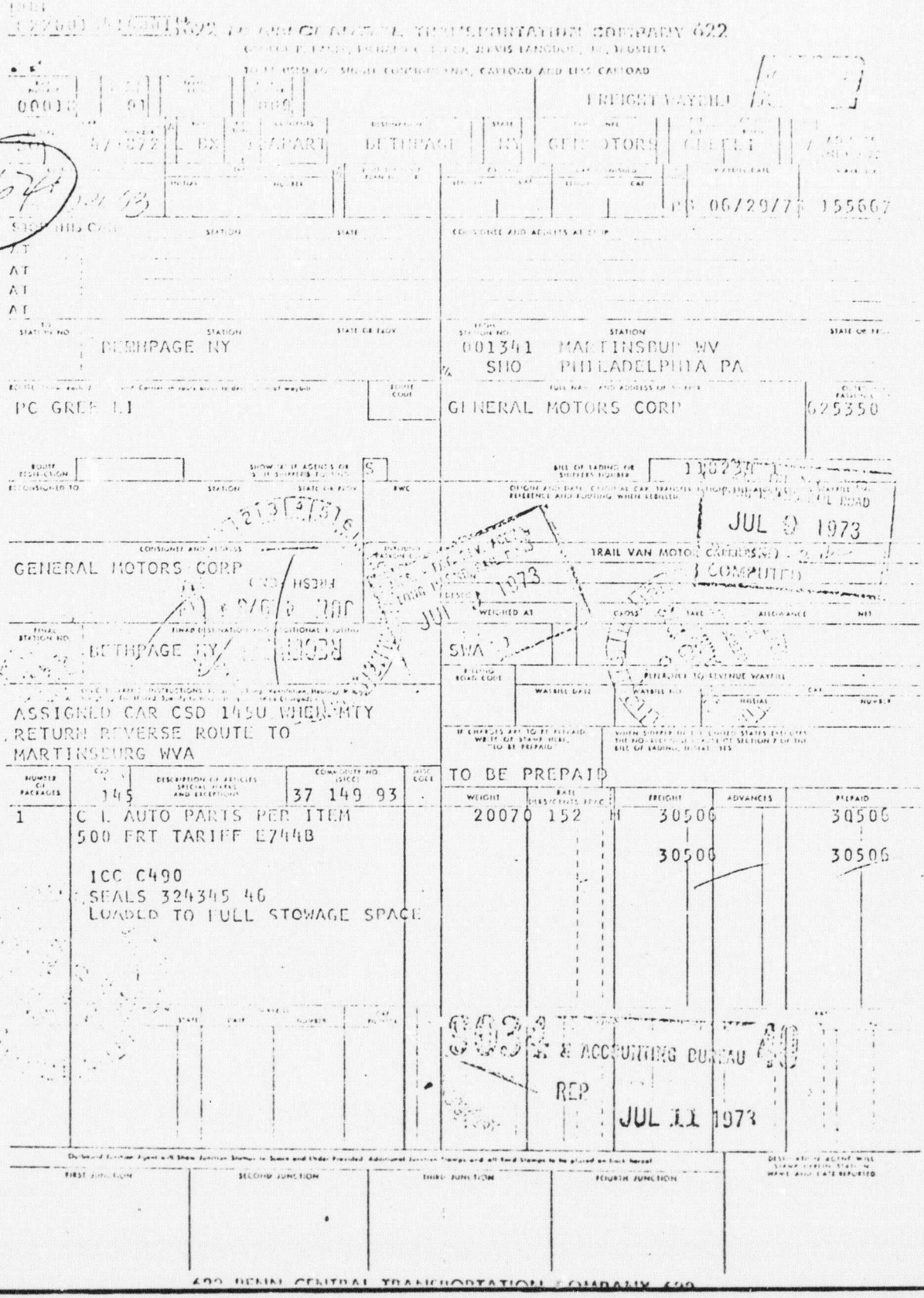


EXHIBIT D, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR



FREIGHT WAYBILL

DETHPAGE NY

001341 MARTINSBUR WV
SHO PHILADELPHIA PA

PC GREN LI

GENERAL MOTORS CORP 625350

GENERAL MOTORS CORP

DETHPAGE NY

SWA

ASSIGNED CAR CSD 1450 WHEN MTY
RETURN REVERSE ROUTE TO
MARTINSBURG WVA

TO BE PREPAID

| NUMBER OF PACKAGES | CD | DESCRIPTION OF ARTICLES SPECIAL MARKS AND EXCEPTIONS | COMMODITY NO. (SCC) | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|---|---|---|---|---|---|---|---|---|
| 1 | 145 | C L AUTO PARTS PER ITEM 500 FRT TARIFF E744B<br>ICC C490<br>SEALS 324345 46<br>LOADED TO FULL STOWAGE SPACE | 37 149 93 | 20070 | 152 | 30506<br>30506 | | 30506<br>30506 |

JUL 9 1973

TRAIL VAN MOTOR CARRIERS INC

COMPUTED

ACCOUNTING BUREAU

REP

JUL 11 1973

EXHIBIT E, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

My name is John E. Cremmins and I am Manager-Corporate Accounting for joint petitioner herein, The Long Island Rail Road Company (hereinafter "LIRR"). In such capacity I have supervisory and administrative responsibility for the books of account and financial records of the LIRR, from which the Annual Rail Form A Reports are compiled for filing with the Interstate Commerce Commission.

I have reviewed the Annual Rail Form A Reports filed by the LIRR with the ICC for the years 1966 through 1972, inclusive, and for each of such years have set out in my Exhibit 1, annexed hereto and made a part hereof, the freight revenues and freight expenses for LIRR and then show the net loss or deficit for freight operations for each such year.

VERIFICATION

STATE OF NEW YORK )
: ss.:
COUNTY OF QUEENS )

JOHN E. CREMMINS, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

John E. Cremmins
JOHN E. CREMMINS

Subscribed and sworn to before me this 24th day of August 1973.

Mary Gallo (SEAL)
Mary Gallo
Notary Public, State of New York
No. 52-1365325, Suffolk County

Docket 35790
Exhibit E
V.S. John E. Cremmins

EXHIBIT E, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

123a

LIRR
FREIGHT LOSSES FOR THE YEARS 1966 THRU 1972

| | 1972 | 1971 | 1970 | 1969 | 1968 | 1967 | 1966 | Totals |
|---|---|---|---|---|---|---|---|---|
| **Revenue** | | | | | | | | |
| Freight | $8,656,685 | $9,872,560 | $9,592,431 | $9,118,600 | $9,224,993 | $8,947,897 | $8,754,028 | $64,167,194 |
| Switching | 41,290 | 44,530 | 41,212 | 11,226 | 11,424 | 8,826 | 7,992 | 166,500 |
| Demurrage | 451,913 | 460,246 | 715,998 | 721,308 | 612,302 | 589,693 | 563,630 | 4,115,090 |
| Rents | 17,559 | 12,960 | 18,696 | 15,443 | 13,729 | 15,061 | 14,648 | 108,096 |
| Misc. | 22,410 | 36,822 | 38,450 | 44,038 | 52,214 | 34,105 | 39,137 | 267,176 |
| Total Revenue | $9,189,857 | $10,427,118 | $10,406,787 | $9,910,615 | $9,914,662 | $9,595,582 | $9,379,435 | $68,824,056 |
| **Expense** | | | | | | | | |
| Maint. of Way | 2,411,494 | 2,427,405 | 2,197,681 | 1,920,503 | 1,614,032 | 1,709,620 | 1,769,059 | 14,049,794 |
| Maint. of Equip. | 2,235,388 | 2,326,093 | 2,246,828 | 1,974,862 | 1,747,639 | 1,487,620 | 1,290,634 | 13,309,064 |
| Traffic | 335,652 | 328,768 | 212,487 | 291,333 | 295,681 | 333,806 | 358,995 | 2,156,722 |
| Transportation | 10,200,953 | 11,647,738 | 10,515,605 | 9,083,569 | 8,465,952 | 8,022,254 | 7,135,002 | 65,071,073 |
| General | 2,455,492 | 2,099,336 | 1,341,533 | 1,158,706 | 1,108,682 | 910,597 | 875,780 | 9,950,126 |
| Total Expense | $17,638,979 | $18,829,340 | $16,514,134 | $14,428,973 | $13,231,986 | $12,463,897 | $11,429,470 | $104,536,779 |
| Net Revenue RR Oper. | ($8,449,122) | ($8,402,222) | ($6,107,347) | ($4,518,358) | ($3,317,324) | ($2,868,315) | ($2,050,035) | ($35,712,723) |
| Railway tax accruals | 893,577 | 973,360 | 996,574 | 927,808 | 847,723 | 777,473 | 693,545 | 6,110,060 |
| RR Operating Income | (9,342,699) | (9,375,582) | (7,103,921) | (5,446,166) | (4,165,047) | (3,645,788) | (2,743,580) | (41,822,783) |
| Rent Income | 97,210 | 10,001 | 22,237 | 58,656 | 85,274 | 53,856 | 77,282 | 404,516 |
| Rents Payable | 2,215,884 | 2,336,836 | 2,486,168 | 3,049,885 | 2,882,635 | 2,435,440 | 2,202,119 | 17,608,967 |
| Net Rents | 2,118,674 | 2,326,835 | 2,463,931 | 2,991,229 | 2,797,361 | 2,381,584 | 2,124,837 | 17,204,451 |
| Net Loss | ($11,461,373) | ($11,702,417) | ($9,567,852) | ($8,437,395) | ($6,962,408) | ($6,027,372) | ($4,868,417) | ($59,027,234) |

Source: Railroad Annual Report Form A

EXHIBIT F, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR.

My name is Joseph J. Remington, and I am a transportation consultant maintaining offices at 532 N. Washington Street, Alexandria, Virginia. I have been an independent transportation consultant since 1957 and prior to that I was employed by William B. Saunders, a transportation consultant, as a transportation cost analyst. I have testified before the Commission as a transportation cost analyst in many proceedings including Dockets 29885, 31358 and 33145. In addition, I worked with Ford K. Edwards when he was retained by the State of New York in connection with the acquisition in 1966 of the LIRR from the then Pennsylvania Railroad Co. I have also testified in connection with various railroad merger proceedings including the Norfolk and Western Ry-Chesapeake and Ohio Ry proceeding and the Norfolk and Western Ry Inclusion of Erie Lackawana Ry proceeding.

At the request of the LIRR, I have made a cost analysis of GMC traffic from various origins to destination at Bethpage, Long Island. A copy of such cost analysis is annexed hereto and made a part hereof as Exhibit 1. In making this cost analysis, I was furnished by the LIRR with 38 waybills on such traffic originating during the month of June 1973. As indicated by the verified statement of James L. Faraci, the freight rates shown on such waybills for the various movements had been rechecked and found to be proper, lawful and accurate and I thereby have utilized such freight rates in my cost analysis.

In developing the cost figures in my Exhibit 1, I utilized RAIL CARLOAD COST SCALES BY TERRITORIES FOR THE YEAR 1970, Statement No. 1C1-70 as compiled and published by the Interstate Commerce

EXHIBIT F, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

Commission, Bureau of Accounts. For the development of the cost figures on this traffic, I used the territorial averages for Region II, Table 3. The short line miles for the traffic between origin and "New York, N. Y." were furnished by the LIRR which they obtained from Trunk Line Central Territory Railroad Freight Tariff E-1009-A;ICC-C-391, B.B. Maurer, Agent. I estimated actual miles from New York, N. Y. to Selkirk and back to Fresh Pond at 225 miles and as shown by LIRR official timetables, the distance from Fresh Pond to Bethpage is 24 miles.

I used through train line haul costs for all movements except for Martinsburg origin traffic in which case, I used average train costs. On all movements from Fresh Pond to Bethpage, I used way train costs.

As shown by my Exhibit 1, the GMC traffic from Martinsburg, West Virginia to Bethpage is a deficit movement for the railroads whether considered on the basis of variable costs or fully allocated costs. The traffic from Michigan and Ohio origins does produce a contribution for the railroads both on a variable cost basis and on a fully allocated cost basis. When the 38 shipments as a whole are considered, the deficits produced by the Martinsburg traffic so offsets the contribution from the Michigan and Ohio traffic, that the profitability of the traffic to the railroads becomes extremely marginal at best and when considered in light of the costs of maintaining the switch connection and trackage, the value of the traffic to the railroads and LIRR in particular becomes very questionable.

When one looks at the freight operating deficits reported by LIRR in its annual Rail Form A which deficits are set forth in the verified statement of John E. Cremmins, submitted simultaneously herein, and at the

EXHIBIT F, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

nature of the LIRR's handling of the involved traffic as detailed in the verified statement of Donald M. Kadel, submitted simultaneously herein, one can only conclude that the territorial average costs do not accurately reflect LIRR's true costs of operations for handling the CMC traffic and that actually LIRR sustains a substantial loss in the handling of this traffic.

(Verified by Joseph J. Remington, August 24, 1973.)

Docket
Exhibit 1
V.S. Joseph J. Remington

NESTED AUTO PARTS TO BETHPAGE, LONG ISLAND
Special Purpose Box Cars - 1970 Region II Costs

| | Grand Blanc, Mich. | Pontiac, Mich. | Waterford, Mich. | Flint, Mich. | Lansing, Mich. | Toledo, Ohio | Martinsburg, W. Va. | Total |
|---|---|---|---|---|---|---|---|---|
| Cars | 1 | 3 | 3 | 6 | 7 | 1 | 17 | 38 |
| S. L. Miles to Fresh Pont | 657 | 649 | 649 | 657 | 707 | 668 | 257 | xxx |
| Actual Miles to Fresh Pond (line 2 x 1.17) | 769 | 759 | 759 | 769 | 827 | 782 | 301 | xxx |
| Estimated Miles to & from Selkirk | | | | | | | 225 | xxx |
| Actual Miles Fresh Pond to Bethpage | 24 | 24 | 24 | 24 | 24 | 24 | 24 | xxx |
| Billed Cwt. (average) | 200 | 200 | 200 | 202 | 200 | 200 | 205 | xxx |
| Through train car mile unit cost | 36.603¢ | 36.603¢ | 36.603¢ | 36.603¢ | 36.603¢ | 36.603¢ | | xxx |
| Average train car mile unit cost | | | | | | | 36.726¢ | xxx |
| Through train car mile cost per cwt. (Line 7 ÷ line 6) | .1830¢ | .1830¢ | .1830¢ | .1812¢ | .1830¢ | .1830¢ | | xxx |
| Average train car mile cost per cwt. (Line 8 ÷ Line 6) | | | | | | | .17924 | xxx |
| Cwt. mile unit cost -through train | .0113¢ | .0113¢ | .0113¢ | .0113¢ | .0113¢ | .0113¢ | | xxx |
| Cwt. mile unit cost-average train | | | | | | | .0173¢ | xxx |
| Variable line haul cost per cwt. mile (Lines 9 or 10 + lines 11 or 12) | .1943¢ | .1943¢ | .1943¢ | .1925¢ | .1943¢ | .1943¢ | .1905¢ | xxx |
| Carload unit cost at origin | 5032¢ | 5032¢ | 5032¢ | 5032¢ | 5032¢ | 5032¢ | 5032¢ | xxx |
| Carload Unit cost at origin per cwt. (Line 14 ÷ line 6) | 25.16¢ | 25.16¢ | 25.16¢ | 24.91¢ | 25.16¢ | 25.16¢/ | 24.55¢ | xxx |
| Cwt. unit cost | .032¢ | .032¢ | .032¢ | .032¢ | .032¢ | .032¢ | .032¢ | xxx |
| Variable terminal cost per cwt. (Line 15 -- line 16) | 25.192¢ | 25.192¢ | 25.192¢ | 24.942¢ | 25.192¢ | 25.192¢ | 24.582¢ | xxx |
| Line haul cost per cwt. to Fresh Pond (Lines 3 & 4 x line 13) | 149.417¢ | 147.474¢ | 147.474¢ | 149.417¢ | 160.686¢ | 151.943¢ | 102,202¢ | xxx |
| Variable cost per cwt. to Fresh Pond (Line 17 -- line 18) | 174.609¢ | 172.666¢ | 172.666¢ | 174.359¢ | 185.878¢ | 177.135¢ | 126.784¢ | xxx |
| Cost per cwt. Fresh Pond to Bethpage - way train: | | | | | | | | |

EXHIBIT F, ANNEXED TO FOREGOING OPENING STATEMENT OF LIRR

| | Grand Blanc, Mich | Pontiac, Mich. | Waterford, Mich. | Flint, Mich. | Lansing, Mich. | Toledo, Ohio | Martinsburg, W. Va. | Total |
|---|---|---|---|---|---|---|---|---|
| Carload unit cost at destination per cwt (Line 15) | 25.16¢ | 25.16¢ | 25.16¢ | 24.91¢ | 25.16¢ | 25.16¢ | 24.55¢ | xxx |
| Way train car mile unit cost | 46.491¢ | 46.491¢ | 46.491¢ | 46.491¢ | 46.491¢ | 46.491¢ | 46.491¢ | xxx |
| Way train car mile cost per cwt (Line 22 -:- line 6) | .2325¢ | .2325¢ | .2325¢ | .2302¢ | .2325¢ | .2325¢ | .2268¢ | xxx |
| Way train cwt. mile unit cost | .0176¢ | .0176¢ | .0176¢ | .0176¢ | .0176¢ | .0176¢ | .0176¢ | xxx |
| Way train cost per cwt mile (Line 23 + line 24) | .2501¢ | .2501¢ | .2501¢ | .2478¢ | .2501¢ | .2501¢ | .2444¢ | xxx |
| Line haul cost per cwt-Fresh Pond to Bethpage (Line 5 x line 25) | 6.002¢ | 6.002¢ | 6.002¢ | 5.947¢ | 6.002¢ | 6.002¢ | 5.866¢ | xxx |
| Variable cost per cwt to Bethpage (Line 21 -- line 26) | 31.162¢ | 31.162¢ | 31.162¢ | 30.857¢ | 31.162¢ | 31.162¢ | 30.416¢ | xxx |
| Variable cost per cwt-origin to destination (Line 19 -- line 27) | 206¢ | 204¢ | 204¢ | 205¢ | 217¢ | 208¢ | 157¢ | xxx |
| Constant cost per cwt mile | .0121¢ | .0121¢ | .0121¢ | .0121¢ | .0121¢ | .0121¢ | .0121¢ | xxx |
| Constant cost per cwt. | 2.705¢ | 2.705¢ | 2.705¢ | 2.705¢ | 2.705¢ | 2.705¢ | 2.705¢ | xxx |
| Constant cwt mile cost per cwt (E lines 3, 4 & 5 x line 29) | 9.595¢ | 9.474¢ | 9.474¢ | 9.595¢ | 10.297¢ | 9.753¢ | 6.655¢ | xxx |
| Fully allocated cost per cwt (E lines 19, 27 & 31) | 215¢ | 213¢ | 213¢ | 215¢ | 227¢ | 218¢ | 164¢ | xxx |
| Revenue per cwt | 239¢ | 239¢ | 239¢ | 239¢ | 248¢ | 241¢ | 152¢ | xxx |
| Profit (or loss) per cwt-Variable costs | 33¢ | 35¢ | 35¢ | 34¢ | 31¢ | 33¢ | (5¢) | 16.1¢ ¥ |
| Profit (or loss) per cwt-Full costs | 24¢ | 26¢ | 24¢ | 24¢ | 21¢ | 23¢ | (12¢) | 7.5¢ ¥ |

¥ Weighted Average

Source Rail Carload Cost Scales by Territory for the year 1970; Statement No. ICI-70

STATEMENT OF FACTS AND ARGUMENT OF GENERAL MOTORS CORPORATION.
BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | | |
|---|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Petitioner<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Respondent | ) | DOCKET NO. 35790 |

STATEMENT OF FACTS AND ARGUMENT

I

Introduction

This proceeding asks for a declaratory finding as to the lawfulness of a rail carrier's demand that a shipper be required to maintain a railroad owned switch connection between an industrial sidetrack and the carrier's main line, when the switch connection lies upon the right-of-way of the carrier. Petitioner believes the position of the carrier is unreasonable and unlawful and that public policy, if not the law, prohibits the carrier from suspending service over the

switch connection if those terms are not met. Petitioner will further demonstrate that maintenance of railroad right-of-way or track by a shipper amounts to a double charge and that railroad compulsion of such maintenance will inflict grave harm upon petitioner.

II

Statement of Facts

1. Your Petitioner, General Motors Corporation, (hereinafter sometimes referred to as "Petitioner") is a Delaware Corporation, with principal offices located in Detroit, Michigan, and is duly qualified and licensed to transact business in the State of New York. For business reasons, General Motors functions through several unincorporated divisions, one of which is the General Motors Parts Division.

2. Petitioner's General Motors Parts Division is, and has been for some time prior to the times referred to in this Petition, carrying on warehousing, sales and distribution operations on premises which are located within the County of Nassau, State of New York, and in the municipality of Bethpage, Long Island, said premises being

known as General Motors Parts Distribution Center. Said Parts Distribution Center is located on a line of Respondent's railroad. An existing switch and certain railroad-owned track connects the railroad line to an industry sidetrack.

3. On said premises Petitioner receives, warehouses, stores, sells and distributes automotive parts for vehicles manufactured and sold by General Motors Corporation, and otherwise carries on its general business activities pertinent to such operation. The great bulk of inbound freight is delivered by Respondent. The premises contain a major replacement parts warehouse and distribution facility servicing General Motors dealers throughout the metropolitan New York City area and portions of outlying areas. In excess of two million automobile owners are ultimately dependent on such facility for the availability of replacement parts.

4. Respondent, The Long Island Rail Road Company, (hereinafter sometimes referred to as "Respondent") has its principal offices at Jamaica Station, in the City of New York, County of Queens, State of New York. Respondent is a common carrier by rail of freight and, as such, is sub-

ject to the provisions of the Interstate Commerce Act, Title 49 U.S.C. §1, et seq., and to regulations issued and promulgated by the Interstate Commerce Commission under its statutory powers.

5. Respondent, is now, and has been at all times material to this Petition, a common carrier of property by railroad, and has been servicing Petitioner's aforementioned operations at Bethpage, Long Island, New York, via a switch connection leading from Respondent's railroad line to a sidetrack located on property of Petitioner and operated by Petitioner. The connection was established in accordance with the terms of Section 1(9) of the Interstate Commerce Act, which reads as follows:

> "(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any

> such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

Said connection was established at the request of Petitioner in 1965. (See verified statement of Mr. William Burke, attached hereto as Appendix A.)

6. Petitioner normally receives approximately fifteen rail freight cars of auto parts every week at its Parts Distribution Center at Bethpage moving from various origins in the United States. These shipments have traditionally been transported in rail service.

7. Respondent participates in and is a party to rates and schedules lawfully on file with the Interstate Commerce Commission thereby holding itself out to

transport and deliver automobile parts and accessories to Petitioner's place of business at Bethpage, Long Island, at its published rates and no other, pursuant to the Interstate Commerce Act. In accordance with §1 of said Act, Respondent has provided and maintained the necessary switch connection with Petitioner's industrial sidetrack at Bethpage, Long Island, New York.

8. Respondent is obligated as a common carrier by rail under terms of §1 of the Interstate Commerce Act to continue delivering rail car shipments of automobile parts and accessories to Petitioner's place of business at Bethpage, Long Island, until the rates published by Respondent are permitted to be canceled or service discontinued in accordance with the requirements of the Interstate Commerce Act. Respondent, however, has threatened to suspend service over the existing swtich connection, thus terminating freight service to the Parts Distribution Center, unless Petitioner pays to it an additional charge, not published in Respondent's tarriff or tariffs, for maintenance of track and other facilities located wholly upon the right-of-way of Respondent. It is this condition

which Petitioner considers to be unreasonable and unlawful and for which Petitioner seeks the redress of this Commission.

9. On or about the 30th day of October, 1972, by letter addressed to General Motors Corporation, Respondent Long Island Rail Road Company threatened to place out of service on November 15, 1972, the switch track connecting the sidetrack which serves Petitioner's Parts Distribution Center at Bethpage, Long Island, New York and the main line of Respondent, unless Petitioner executed a sidetrack agreement with Respondent which would, among other things, obligate Petitioner to maintain the switch connection, tracks, and other facilities owned by Respondent and located entirely on Respondent's right-of-way. This, Petitioner refused to do.

10. Action, threatened by Respondent, would cause said switch to be placed out of service and would suspend rail car deliveries in disregard of the required administrative process, an action which would have thereby unlawfully and illegally deprived Petitioner of its statutory right to receive freight service by rail at said premises pursuant to Section 1(9) of the Interstate Commerce Act (49 U.S.C.

§1(9)). Further, Petitioner believes that the threatened action would constitute an abrogation of Respondent's duty as a common carrier to serve all shippers located on its lines of track as provided by Section 1, et seq., of the Interstate Commerce Act, Title 49 U.S.C., § et seq., requiring Respondent to provide reasonable rates, routes and service to the public and to maintain service in accordance with lawfully published rates unless relieved therefrom by order of the Interstate Commerce Commission.

11. This disagreement between Respondent and Petitioner raises the issue of whether a shipper or a railroad is responsible for the maintenance of railroad-owned track and switch connection located on the railroad's main line and right-of-way. Petitioner is willing to maintain and does maintain all track lying upon its own property but believes maintenance of track located on Respondent's right-of-way to be an onerous and unreasonable act; Petitioner believes that to accede to Respondent's demand would constitute a violation of Section 6(1) of the Act (49 U.S.C. §6(1))which provides in part:

> "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules

> showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad...The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require..." (Emphasis supplied)

The charge at issue here is not reflected anywhere in the tariffs of Respondent, and Petitioner believes it is an operating cost properly chargeable to and incurred by Respondent in discharging its duty as a common carrier.

12. Petitioner has been, is, and continues to be willing to execute a sidetract agreement with reasonable terms mutually beneficial to both parties but considers as unreasonable and unlawful and in violation of its right to contract any provision which would require the Petitioner as a receiver of freight to incur any cost in addition to the lawfully published transportation rates of Respondent. An unpublished charge for maintaining railroad property and facilities which Respondent is obligated to provide as a common carrier is such a cost.

13. Respondent alleges the sidetrack agreement proposed by Respondent to be similar to those executed by other freight patrons located on its line of railroad.

14. If Respondent is permitted to suspend service over the switch, Petitioner will suffer delays, shortages, and serious loss of revenue.

15. The subject matter of this Petition relates to the enforcement of the Interstate Commerce Act and the administrative regulations issued thereunder, a matter within the primary jurisdiction of the Interstate Commerce Commission pursuant to 49 U.S.C. §13.

16. As the verified statement of John Tobin (attached hereto as Appendix B) indicates, Petitioner has over 150 facilities with railroad switch connections. Many of these facilities are served by more than one carrier. No carrier other than Respondent has demanded that Petitioner maintain track on land owned by or leased to the carriers.

17. As the verified statement of S.M. Carnahan (attached hereto as Appendix C) indicates, charges for

owning and maintaining switch connections and track owned by a carrier and located on its right-of-way, are an operating cost included in the carrier's rate base for which it is compensated out of freight transportation revenues. This statement demonstrates that the rates on automobile parts are among the highest of all rates on railroad freight transported.

## III.

## Argument

Respondent has threatened Petitioner with cessation of service unless Petitioner accedes to terms in a sidetrack agreement which compels Petitioner to bear the cost of maintaining a railroad-owned switch connection, located wholly upon the railroad's right-of-way, as a precedent to continuing rail service to the private sidetrack. Petitioner believes this to be an unreasonable demand in violation of Section 1(9) of the Interstate Commerce Act. Petitioner's position is based upon the grounds that the track in question is a facility which Respondent is obligated to own and maintain as a common

carrier and the costs of maintaining track lying upon the railroad right-of-way is a cost which has already been included in the railroad's rate base for which Respondent is reimbursed and of the applicable transportation charges. Accordingly, any additional assessment as demanded by Respondent would constitute an unlawful overcharge if paid directly by Petitioner.

A. Respondent's Threatened Action Is An Unlawful Practice In Violation of Section 1(9) Of The Interstate Commerce Act.

Section 1(9) of the Interstate Commerce Act, 49 U.S.C. §1(9), requires a railroad such as Respondent to establish a switch connection with a private industrial sidetrack under certain specified conditions. (§1(9) is set forth in paragraph five of this statement, supra.) If the railroad refuses, then the aggrieved party may apply to the Interstate Commerce Commission for an order requiring the railroad to establish the necessary switch connection.

In the instant situation, all requirements of Section 1(9) have been satisfied. The switch connection was voluntarily established by Respondent in 1965 and Petitioner

has received a substantial number of rail car loads of highly rated and compensatory freight at its facility in accordance with appropriate line haul freight rates published in tariffs on file with the Interstate Commerce Commission. Thus there is sufficient business to justify the maintenance of this facility. The switch connection is practicable, and has been maintained with safety.

Once a switch connection is established between the railroad and a private industrial sidetrack of an industry the carrier holds itself out to perform the service as Respondent has done by participating in published line-haul rates, and the industry has tendered sufficient business to justify the connection, the industry has an implied right to service at such switch, and may lawfully expect that the carrier shall there deliver such freight as it customarily transports for which the switch is suitable and convenient. Interstate Stock-Yards Co. v. Indianapolis Union Ry. Co., 99 Fed 472 (1900); Hines v. Henaghan, 265 Fed 831 (1920). The Supreme Court of the United States has summarized a railroad's obligation in this regard as follows:

> "The general rule is that it is the responsibility of the carrier, as part of the transportation service caused by the line-haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee...in the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding." Sec'y. of Agriculture v. United States, 347 U.S. 645 (1953) at 647.

Thus, once the service is established by the railroad pursuant to the requirements of the Interstate Commerce Act, that service may not summarily and arbitrarily be cancelled and discontinued as threatened by Respondent as long as Respondent continues to publish rates for the transportation of this freight and Petitioner continues to tender sufficient business to justify the switch connection. This is implicit in the requirements of Section 1 et seq. of the Interstate Commerce Act requiring establishment of rates and services.

B. The Nature Of The Traffic Is Highly Desirable

It is well known, and amply demonstrated in the statement of Mr. Carnahan, that automotive parts are highly desirable traffic particularly well adapted to movement by rail. Rates on automotive parts are generally considered to be highly rated and compensatory. As a group, automotive

parts is high density freight, relative to other commodities, moves in substantial volume with even regularity between well defined points and permits good utilization of equipment by the rail carriers. Consequently, a typical freight carload of automotive parts contains approximately 20,000 pounds of freight which moves at rates uniformly above all other traffic rates, returning to the carriers revenues considerably in excess of costs, (cf. cost studies in Mr. Carnahan's statement, Appendix C).

In addition, the volume of traffic being received by Petitioner at its Bethpage facility is both heavy and consistent. Approximately fifteen carloads of parts have been moving into this facility, week after week, for several years, providing a steady and substantial inflow of revenues to the Long Island. (Verified Statement of Mr. Burke, Appendix A.)

Clearly, then, the nature of this traffic is more than substantial enough to justify the switch connection.

C. Existing Railroad Rates In Which The Respondent Participates Provide For Maintenance Of Way And All Other Items Of Routine Maintenance

Railroad tariffs and the accounting rules applicable to railroads have existed for scores of years. The

rate base for rates published by the several carriers, including the Respondent, have long included factors for main enance of carrier owned track and right-of-way. (Appendix C.) The Commission has long recognized that:

> "The conduct of the business of a common carrier by rail embraces, among other things, the maintenance of its right-of-way." Valley & Siletz R.R. Co. v. S. P. Co., 53 I.C.C. 397 (1918), at 399.

The Commission has also recognized that maintenance costs are general costs:

> "A road is built as a complete unit. The cost of maintenance of any particular portion of a line of railroad is charged against no specific traffic with respect to point of origin or destination but is represented in the general costs of moving all traffic." Klamath County Chamber of Commerce v. S.P. Co., 74 I.C.C. 207 (1922), at 213.

The imposition of any additional charge by a rail carrier such as Respondent of questionable validity, in that it is not the type of charge to be published, as required by Section 1 et seq. of the Interstate Commerce Act, and, further, is unreasonable and inequitable in that it is a double charge upon the industry served. Such action can only be viewed as one which will inflict grave harm upon Petitioner and which will deny to

Petitioner the regulatory protection of this Commission, in that Petitioner will be subjected to an unpublished charge, and in addition, one subject to change at the mere whim of the carrier.

### D. Section 1(9) And Other Applicable Sections Of The Interstate Commerce Act Apply Equally To All Railroads, Regardless Of Financial Condition

The financial condition of Respondent may or may not be healthy at this time. The law applies regardless of its financial condition. No provision is made in the statute for different conditions to apply to those rail carriers which do not enjoy profitable operations. Automobile parts are high-rated commodities; that is, the revenue realized by a rail carrier from one freight carload of automotive parts is considerably higher than the revenue realized from one freight carload of almost any other general commodity. The carriers as a group do not complain that rates on automotive parts are not compensatory, nor does the statute condone separate charges for carriers depending upon their financial well being.

STATEMENT OF FACTS AND ARGUMENT OF GENERAL MOTORS CORPORATION

## Conclusion

Here Respondent has sought to use its questionable financial position as an excuse to unlawfully assess charges against Petitioner for maintenance of track and way involved in this matter by denying that the aforesaid charges were included in tariff rates of the Respondent.

If Petitioner were to accede to the unlawful and unreasonable demands of Respondent regarding this matter, Petitioner would be subject to a double charge on shipments consigned to it at its Bethpage, Long Island, facility, and would be greatly harmed thereby.

Respectfully submitted,

/s/

Benson T. Buck
Leonard F. Charla
Attorneys for Petitioner
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Of Counsel:
Ross L. Malone

Dated: Detroit, Michigan
August 8, 1973

APPENDIX A, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Petitioner<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Respondent | DOCKET NO. 35790 |

VERIFIED STATEMENT OF

WILLIAM BURKE

My name is William Burke. My business address is 385 Nordhoff Place, Englewood, N. J. 07631. Since 1957 I have been employed by General Motors Corporation. My present position with General Motors Corporation is Northeast Area Traffic Manager, General Motors Parts Division. I have been in my present position with General Motors Parts Division for four years.

APPENDIX A, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

Among my duties as Northeast Area Traffic Manager I am responsible for the day to day operations of the General Motors Parts Division facility at Bethpage, Long Island, New York.

General Motors Parts Division is responsible for distributing automotive replacement parts to franchised General Motors automobile dealers. Automotive replacement parts are the items necessary to repair vehicles of General Motors customers and the total line of automotive replacement parts maintained by the Parts Division approximates 300,000 different items.

General Motors Parts Division maintains warehousing operations which are referred to as Parts Distribution Centers from which the automobile dealers are supplied replacement parts and accessories and these Parts Distribution Centers are located throughout the United States, including a Parts Distribution Center at Bethpage, Long Island, New York.

The Bethpage Distribution Center was built by General Motors Corporation in 1965, adjacent to the main line of the Long Island Railroad, and is served by the Long Island Railroad through a private industrial sidetrack which connects with the main line of the Long Island Railroad through a switch connection.

APPENDIX A, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

Records to which I have access in my capacity as Northeast Area Traffic Manager indicate that the switch connection was installed at the request of General Motors Corporation in 1965.

The private industrial sidetrack serving the Parts Distribution Center is owned and maintained by General Motors Corporation, and another party not here relevant and is located on private property. The switch connection which connects the tracks of the railroad with the industrial sidetracks is owned by the railroad and located entirely on railroad property.

The Bethpage Distribution Center was located adjacent to the Long Island Railroad because rail service is necessary to the operation of that facility. Automotive replacement parts and accessories are received in rail carload quantities from various points of origin outside New York State approximating three rail carloads daily.

The rail carloads are switched into the Parts Distribution Center over the private industrial sidetrack by engines and crews of the Long Island Railroad to the regular unloading docks adjacent to the Parts Distribution Center in accordance with line haul freight rates published in tariffs filed with the Interstate Commerce Commission, tariffs to which the Long Island Railroad is a party and a concurring line of railroad.

APPENDIX A, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

The line haul rail rates on which the automotive replacement parts traffic moves to the Bethpage Parts Distribution Center entitles each rail carload to be delivered by the Long Island Railroad to the usual place of unloading which is the unloading dock in the Parts Distribution Center.

When the Bethpage Parts Distribution Center was built , it was designed to receive most of the inbound freight by railroad at the unloading docks. The operation at the Distribution Center is so conducted that the largest volume of freight must be received by rail in order to maintain the inventory of parts required to adequately meet customer demands. The Bethpage Center is not equipped to receive corresponding volumes of freight by other means of transportation.

If the Long Island discontinues service as threatened, the operation of the Bethpage Parts Distribution Center would be severely curtailed, requiring reduction of personnel and a loss of business which could not be recovered, for it would not be physically possible to supply this facility by another means of transportation with the volume of freight moved by rail which is required to maintain the inventory necessary to meet customer demands.

Average weekly volume is fifteen (15) freight car loads of automotive and truck parts and components. These cars originate principally at points in the Midwest, including Detroit, Flint, Pontiac, Lansing and Grand Blanc, Michigan and

Ohio and Indiana points. The facility was originally designed to receive the great bulk of its incoming freight by rail. Because of the distance from sources of supply, inbound truck movements of parts in any significant volume were never contemplated by management. Inbound shipments by truck remain completely unfeasible, on a volume basis. Because of space limitations, and the lack of adequate truck-loading facilities, it would be virtually impossible to receive this volume of freight by motor carriage. However, a very limited number of shipments could be received by truck, perhaps on the order of one or two trailer loads per day. A single freight car load normally holds the equivalent of two or more trailer loads. The facility is simply not equipped to receive its present volume of inbound freight wholly or substantially by truck.

The Bethpage Parts Distribution Center serves automobile dealers on Long Island, the three western counties of Connecticut and the eastern counties of New York from New York City to the Canadian border, and it would not be possible to shift the source of these dealers' supplies to other Distribution Centers so as to adequately meet dealer needs and fulfill orders for customers' vehicles awaiting repair.

Suspension of rail deliveries by the Long Island Railroad to the Bethpage Parts Distribution Center would cause irreparable injury to General Motors Parts Division by

prohibiting it from maintaining an adequate supply of parts essential to meet the demands of our dealers and customers thereby resulting in loss of customer confidence and satisfaction.

(Verified by William Burke, July 24, 1973.)

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM.
BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Petitioner<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Respondent | DOCKET NO. 35790 |

VERIFIED STATEMENT OF

JOHN TOBIN

My name is John Tobin. My business address is Argonaut Division, General Motors Corporation, 3044 West Grand Boulevard, Detroit, Michigan 48202. I have been employed by Argonaut Division, General Motors Corporation since 1965. My present position with Argonaut Division is Administrator, Industrial and Commercial Real Estate.

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

Argonaut Division of General Motors Corporation is responsible for acquisition, management, and development functions of real estate owned by or leased to General Motors Corporation. The General Motors Parts Division facility at Bethpage, Long Island, New York, is owned by General Motors Corporation.

Among my duties as Administrator, Industrial and Commercial Real Estate, is the administration of all General Motors facilities served by the several railroads, including the General Motors Parts Division facility at Bethpage, Long Island, New York. Included in the responsibilities of my position is the examination and approval of sidetrack agreements between General Motors and the several railroads for the General Motors facilities served by rail. Argonaut Realty Division has been working with General Motors Parts Division in negotiating a sidetrack agreement proposed by The Long Island Rail Road at Bethpage, Long Island.

General Motors Corporation has over 150 plants and facilities located throughout the central states and

Canada with switch connections at each location with the railroad or railroads serving the area. Many locations are served by more than one rail carrier. A list of the facilities and the carrier(s) serving them is attached as part of my statement. At most, if not all locations, sidetrack agreements are in effect with the railroads serving the General Motors facility. I should add, however, that in all instances, sidetrack agreements are proposed by the railroads. General Motors does not consider that such agreements are necessary for the rail service involved.

I am aware of no instance, other than the one presently before this Commission, in which a rail carrier has demanded payment from General Motors for maintenance of railroad-owned track connecting industry sidetrack to a main line, for track lying upon property owned by the rail carrier, or threatened discontinuance of service.

At all General Motors facilities served by rail, General Motors is ultimately responsible for maintenance of track lying upon its own property, and the railroads are responsible for that track lying upon lands owned by or leased to them.

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

General Motors is a substantial user of rail services and does not believe the demands made upon it by the Long Island Rail Road to be reasonable.

(Verified by John Tobin, July 23, 1973.)

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

LIST OF GM FACILITIES SERVED BY RAIL

| PLANT NAME | LOCATION | SERVED BY RAILROAD(S) |
|---|---|---|
| AC Spark Plug | Flint, Mich. | C&O |
| Buick Motor | Flint, Mich. | C&O |
| Cadillac Motor Car | Detroit, Mich. | PC, DT |
| | Livonia, Mich. | C&O |
| Central Foundry | Saginaw, Mich. | C&O |
| | Bedford, Ind. | L&N, Milw |
| | Danville, Ind. | PC |
| | Defiance, Ohio | B&O |
| Chevrolet Motor | Bay City, Mich. | PC, B&O |
| | Buffalo, NY | EL |
| | Detroit, Mich. | GTW, PC |
| (Assembly) | Flint, Mich. | GTW |
| (Eng. & Met. Fab.) | Flint, Mich. | GTW |
| (Manufacturing) | Flint, Mich. | GTW |
| | Indianapolis, Ind. | I.U. |
| | Livonia, Mich. | C&O |
| | Massena, NY | PC |
| | Muncie, Ind. | PC |
| | Parma, Ohio | PC, B&O |
| | Saginaw, Mich. | C&O |
| | Toledo, Ohio | DT&I |
| | Tonawanda, NY | PC |
| | Warren, Mich. | PC |
| Delco Electronics | Kokomo, Ind. | PC |
| Delco Moraine | Dayton, Ohio | PC, B&O |
| Delco Products | Kettering, Ohio | PC |
| | Rochester, NY | B&O |
| Delco Remy | Anderson, Ind. | PC, CIND |
| | Anaheim, Calif. | SP |
| | Muncie, Ind. | PC,CO |
| | New Brunswick, NJ | PC |
| | Olathe, Kans. | ATSF |
| Detroit Diesel-Allison | Indianapolis, Ind. | PC, B&O |
| | Detroit, Mich. | C&O |
| | Wayne, Mich. | C&O |
| Diesel Equipment | Grand Rapids, Mich. | C&O |
| Electro Motive | LaGrange, Ill. | BOCT, IHB |
| Fisher Body | Chicago, Ill. | ATSF |
| (Coit Road) | Cleveland, Ohio | PC |
| | Columbus, Ohio | PC |
| | Elyria, Ohio | PC |
| (Euclid) | Cleveland, Ohio | NKN |

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

| PLANT NAME | LOCATION | SERVED BY RAILROAD(S) |
|---|---|---|
| Fisher Body con't | | |
| (Fleetwood) | Detroit, Mich. | CO, PC, NW |
| (Fort Street) | Detroit, Mich. | CO, PC, NW |
| (Coldwater) | Flint, Mich. | C&O |
| (Flint #1) | Flint, Mich. | C&O |
| | Grand Blanc, Mich. | C&O |
| (Metal Fab.) | Grand Rapids, Mich. | PC |
| (Trim) | Grand Rapids, Mich. | PC |
| | Hamilton, Ohio | B&O |
| | Kalamazoo, Mich. | PC, GTW |
| | Lansing, Mich. | PC |
| | Livonia, Mich. | C&O |
| | Lordstown, Ohio | PC |
| | Mansfield, Ohio | EL |
| | Marion, Ind. | PC |
| | Pittsburgh, Penn. | URR |
| | Pontiac, Mich. | GTW |
| | Syracuse, NY | PC |
| | Tecumseh, Mich. | DTI |
| | Trenton, NJ | RDG |
| Frigidaire | Dayton, Ohio | B&O |
| | Moraine, Ohio | PC |
| GM Assembly | Westland, Mich. | C&O |
| | Arlington, Texas | T&P |
| | Baltimore, Md. | B&O, PC |
| | Detroit, Mich. | PC |
| | Doraville, Ga. | Sou |
| | Fairfax, Kans. | UP |
| | Framingham, Mass. | PC |
| | Freemont, Calif. | SP |
| | Janesville, Wisc. | CNW. Milw |
| | Lakewood, Ga. | Sou |
| | Leeds, Md. | MP |
| | Linden, NJ | PC |
| | Lordstown, Ohio | PC |
| | Norwood, Ohio | PC, B&O |
| | St. Louis, Mo. | TRRA |
| | South Gate, Calif. | SP |
| | Tarrytown, NY | PC |
| | Van Nuys, Calif. | SP |
| | Willow Run, Mich. | PC |
| | Wilmington, Del. | B&O |

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

| | | |
|---|---|---|
| GM Parts | Atlanta, Ga. | Sou |
| | Baltimore, Md. | B&O |
| | Birmingham, Ala. | Sal |
| | Bloomfield, NJ | EL |
| | Boston, Mass. | PC |
| | Buffalo, NY | PC |
| | Charlotte, N.C. | SCL |
| | Chicago, Ill. | IHB |
| | Cincinnati, Ohio | PC |
| | Cleveland, Ohio | B&O, PC |
| | Dallas, Tex. | MKT |
| | Denver, Colo. | UP |
| (Riopelle Avenue) | Detroit, Mich. | GTW |
| (Decatur Avenue) | Detroit, Mich. | C&O |
| | Drayton Plains, Mich. | GTW |
| | Flint, Mich. | GTW |
| | Grand Blanc, Mich. | C&O |
| | Houston, Tex. | SP |
| | Indianapolis, Ind. | PC |
| | Jacksonville, Fla. | FEC |
| | Kansas City, Kans. | SLSF |
| | Lansing, Mich. | GTW |
| | Livonia, Mich. | C&O |
| | Los Angeles, Calif. | ATSF |
| | Louisville, Ky. | Sou |
| | Martinsburg, W. Va. | B&O |
| | Milwaukee, Wisc. | Milw |
| | Minneapolis, Minn. | MNES |
| | New Orleans, La. | ICG |
| | New York, NY | LI |
| | Newark, NJ | EL |
| | Oakland, Calif. | SP |
| | Oklahoma City, Okla. | ATSF |
| | Omaha, Neb. | UP |
| | Philadelphia, Penn. | RDG |
| | Pittsburgh, Penn. | N&W |
| | Portland, Ore. | BN |
| | Pontiac, Mich. | GTW |
| | Richmond, Va. | C&O |

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

| PLANT NAME | LOCATION | SERVED BY RAILROAD(S) |
|---|---|---|
| GM Parts con't | St. Louis, Mo. | N&W |
| | Toledo, Ohio | PC |
| GMC Truck and Coach | Pontiac, Mich. | GTW |
| | Boston, Mass. | BM |
| | Chamblee, Ga. | Sou |
| | Chicago, Ill. | BOCT |
| | Dallas, Tex. | MKT |
| | Elizabeth, NJ | CNJ |
| | Kansas City, Kans. | UP |
| | Memphis, Tenn. | ICG |
| | Oakland, Calif. | SP |
| | Pittsburgh, Penn. | BLE |
| | Willow Run, Mich. | PC |
| Guide Lamp Div. | Anderson, Ind. | PC |
| Harrison Radiator Div. | Lockport, NY | PC |
| | Buffalo, NY | EL |
| Hydra-Matic Div. | Willow Run, Mich. | PC |
| Inland Div. | Dayton, Ohio | B&O |
| | Vandalia, Ohio | B&O |
| New Departure - Hyatt Bears. | Bristol, Conn | PC |
| | Clark, NJ | LV |
| | Sandusky, Ohio | N&W |
| Oldsmo[illegible]e Div. | Lansing, Mich. | GTW, PC |
| Packa[illegible]lectric Div. | Warren, Ohio | EL |
| Pontiac [illegible]otor Div. | Pontiac, Mich. | GTW |
| Rochester Products Div. | Rochester, NY | Rochester Subway R.R. |
| Saginaw Steering Gear Div. | Saginaw, Mich | C&O |
| Teres Div. | Cleveland, Ohio | N&W |
| | Hudson, Ohio | PC |
| United Delco Div. | Atlanta, Ga. | Sou |
| (Warehouses) | Dallas, Tex | MKT |
| | Denver, Colo. | Up |
| | Detroit, Mich. | Union Belt |
| | Elk Grove Village, Ill. | CNW |
| | Kansas City, Kans. | UP |
| | LaMirada, Calif. | ATSF |
| | Memphis, Tenn. | MP |
| | North Brunswick, NJ | PC |
| | Seattle, Wash. | UP |

APPENDIX B, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

## EXPLANATION OF RAILROAD ABBREVIATIONS

| Abbreviation | |
|---|---|
| ATSF | The Atchison, Topeka, and Santa Fe Railway Company |
| B&O | Baltimore and Ohio Railroad Company |
| BM | Boston & Maine Corporation-Robert W. Meserve and Charles W. Bartlett, Trustees |
| BOCT | The Baltimore and Ohio Chicago Terminal Railroad Company |
| BLE | Bessemer and Lake Erie Railroad Company |
| BN | Burlington Northern, Inc. |
| CNJ | The Central Railroad Company of New Jersey, Robert D. Timpany, Trustee |
| Milw | Chicago, Milwaukee, St. Paul and Pacific Railroad Company |
| CIND | Central Indiana Railway Company |
| CNW | Chicago and North Western Transportation Company |
| C&O | The Chesapeake and Ohio Railway Company |
| DTI | Detroit Toledo and Ironton Railroad Company |
| DT | Detroit Terminal Railroad Company |
| EL | Erie Lackawanna Railway Company, Thomas F. Patton and Ralph S. Tyler, Jr., Trustees |
| FEC | Florida East Coast Railway Company |
| GTW | Grand Trunk Western Railroad Company |
| IHB | Indiana Harbor Belt Railroad Company |
| ICG | Illinois Central Gulf Railroad Company |
| IU | The Indianapolis Union Railway Company |
| LI | The Long Island Railroad Company |
| LN | Louisville Nashville Railroad Company |
| LV | Lehigh Valley Railroad Company, John F. Nash and Robert C. Haldeman, Trustees |
| MP | Missouri Pacific Railroad Company |
| NW | Norfolk and Western Railway Company |
| PC | Penn Central Transportation Company, George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees |
| RDG | Reading Company, Richardson Dillworth and Andrew L. Lewis, Jr., Trustees |
| SCL | Seaboard Coast Line Railroad Company |
| SLSF | St. Louis-San Francisco Railroad Company |
| SP | Southern Pacific Transportation Company |
| Sou | Southern Railway Company |
| TRRA | Terminal Railroad Association of St. Louis |
| TP | The Texas and Pacific Railway Company |
| URR | Union Railroad Company |
| UP | Union Pacific Railroad Company |

APPENDIX C, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>A Corporation of the State of Delaware<br><br>Petitioner<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD<br><br>A Corporation of the State of New York<br><br>Respondent | DOCKET NO. 35790 |

VERIFIED STATEMENT OF

SIDNEY M. CARNAHAN

My name is Sidney M. Carnahan. My business address is 30007 Van Dyke, Warren, Michigan 48090. I am Manager, Rate Administration, GM Logistics Operations, General Motors Corporation.

I have been employed by General Motors Corporation since 1960, most of which time has been

spent on the financial staff engaged in financial and cost analysis work. I am a graduate of Western Kentucky University with a B.S. in Commerce, and I have an M.B.A. degree from Wayne State University with a concentration in accounting. Among my duties as Manager, Rate Administration are the review and analysis of rate structures, financial statements, economic changes, and financial condition of carriers serving General Motors Corporation. In addition, I am responsible for negotiating changes in the transportation rates, when the need occurs.

At issue in this proceeding is the propriety of the demand of The Long Island Rail Road, Respondent herein, that General Motors be responsible for maintaining a switch connection owned by The Long Island and located wholly upon the railroad's right-of-way. For reasons which I shall hereinafter set forth, I do not believe that is a reasonable or proper demand. Payment of the charges in addition to payment of freight charges for rail transportation would amount to duplicate payment to the railroad for facilities necessary to provide service under the line haul rates. Moreover, the position taken by The Long Island is an abrupt departure from that consistently adhered to by

the other railroads serving General Motors at other plants and facilities as shown in Mr. John Tobin's statement. None of the other railroads has demanded such additional maintenance payments or threatened to suspend service over the hundreds of other switch connections as The Long Island has done at Bethpage.

According to the Uniform System of Accounts for Railroad Companies as prescribed by the Interstate Commerce Commission, the expense of owning, installing and maintaining a switch connection necessary to serve an industry should be accounted for by a railroad in the same manner as structures, ties, rails and other track material. In this regard, I quote from the Instructions for Maintenance Expenses as follows:

> "3-1 Items to be charged. (a) The accounts provided for maintenance of road property and of equipment are designed to show the cost of repairs and also the loss through depreciation of the property used in transportation operations, including expenses resulting from ordinary wear and tear of service, exposure to the elements, inadequacy, obsolescence, or other depreciation, or from accident, fire, flood, or other casualty." (p. 22)

APPENDIX C, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

The foregoing guideline authoritatively establishes that the cost of all maintenance, including sidetrack connections constructed to mainline or other sidings shall be charged to the appropriate account. Thus, in accordance with appropriate accounting procedures, the maintenance of such facilities should be charged to appropriate operating expense consistent with these accounting procedures. Maintenance expense for the switch connection is included in the expenses covered by the railroads' rate base upon which freight transportation revenues are gathered. Since the rates paid by shippers for transportation service include not only the cost of owning and installing, but also the cost of maintaining the switch, Respondent's demand for additional payments under the proposed sidetrack agreement would cause General Motors to pay twice for the maintenance of this facility.

Also, I wish to point out that automobile parts are considered very desirable traffic and statistics published by the Department of Transportation show that it is substantially more remunerative to the railroads than average traffic. In fact, the Department of Transportation's contribution studies disclose that a greater

portion of rail revenue from the transportation of automobile parts is carried to net income as contribution and exceeds both variable and fully allocated costs by greater margins than all traffic handled by the railroads as a whole.

As Table No. 1 indicates, revenues from automobile parts exceeded variable costs by 139.9% as compared with the ratio of revenue to costs of all commodities of 120.5%. Also, the comparisons shown in Table No. 2 from the Department of Transportation studies (one percent waybill sample) T. D. 1 for 1969 reveal that revenue on automobile parts traffic is higher whether measured by revenue per car, revenue per 100 pounds, revenue per car miles, or revenue per ton mile.

In view of the above, it is clear that the Respondent, under existing operating practices and I.C.C. accounting rules is responsible for the maintenance of the switch connection. Furthermore, in this particular case, traffic being handled by Respondent over the switch connection into the General Motors Parts Distribution Center is, by recognized standards, more profitable than

the average for all commodities handled by Respondent. Based upon the profitability of this traffic, it would warrant the conclusion that there is sufficient business to justify continued maintenance of the track by The Long Island.

APPENDIX C, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

TABLE I

COMPARISON OF RAIL PROFITABILITY
RATIO OF REVENUE TO COST
CALENDAR YEAR 1969

| | TOTAL ALL COMMODITIES | | MOTOR VEHICLE PARTS OR ACCESSORIES-3714 | |
|---|---|---|---|---|
| | Variable | Total Fully Allocated Cost | Variable | Total Fully Allocated Cost |
| Official to Official | 120.5 % | 101.1 % | 139.9% | 129.1 % |
| Official to South | 141.1 | 119.6 | 168.4 | 151.9 |
| Official to West | 145.0 | 125.9 | 148.1 | 131.4 |
| Southern to Official | 131.4 | 109.5 | 141.3 | 126.7 |
| Western to Official | 115.5 | 97.0 | 162.6 | 144.9 |

Source:
U.S. Department of Transportation
Official Policy Review, Release of January, 1973,
"An Estimation of the Distribution of the Rail Revenue Contribution by Commodity Groups and Type of Rail Car 1969"

APPENDIX C, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

TABLE II

MOTOR VEHICLE PARTS OR ACCESSORIES
REVENUE COMPARISON WITH ALL TRAFFIC - 1969

3714

REVENUE PER CAR

| Territory | Motor Vehicle Parts | All Traffic | % Motor Vehicle is of Total |
|---|---|---|---|
| US-US | $ 562 | $ 352 | 160% |
| US-Off. | 397 | 344 | 115 |
| Off.-US | 554 | 334 | 166 |
| Off.-Off. | 393 | 266 | 148 |
| Off.-Sou. | 634 | 487 | 130 |
| Off.-WTL | 609 | 607 | 100 |
| Off.-SW | 767 | 834 | 92 |
| Off.-MTP | 1,497 | 1,459 | 101 |

REVENUE PER 100 LBS.

| Territory | Motor Vehicle Parts | All Traffic | % Motor Vehicle is of Total |
|---|---|---|---|
| US-US | 127.0 ¢ | 32.9 ¢ | 386% |
| US-Off. | 90.6 | 31.4 | 289 |
| Off.-US | 124.3 | 30.6 | 406 |

APPENDIX C, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

REVENUE PER 100 LBS. (Continued)

| Territory | Motor Vehicle Parts | All Traffic | % Motor Vehicle is of Total |
|---|---|---|---|
| Off.-Off. | 89.9 ¢ | 23.2 ¢ | 388% |
| Off.-Sou. | 135.1 | 51.5 | 262 |
| Off.-WTL | 128.4 | 99.8 | 129 |
| Off.-SW | 185.1 | 139.1 | 133 |
| Off.-MTP | 311.3 | 279.2 | 111 |

REVENUE PER CAR MILE

| Territory | Motor Vehicle Parts | All Traffic | % Motor Vehicle is of Total |
|---|---|---|---|
| US-US | 82.1 ¢ | 74.1 ¢ | 111% |
| US-Off. | 108.4 | 79.0 | 137 |
| Off.-US | 84.5 | 85.7 | 99 |
| Off.-Off. | 110.2 | 97.7 | 112 |
| Off.-Sou. | 87.8 | 76.9 | 114 |
| Off.-WTL | 86.4 | 75.8 | 114 |
| Off.-SW | 63.2 | 68.2 | 108 |
| Off.-MTP | 61.1 | 58.6 | 104 |

APPENDIX C, ANNEXED TO FOREGOING STATEMENT OF FACTS OF GM

REVENUE PER TON MILE

| Territory | Motor Vehicle Parts | All Traffic | % Motor Vehicle is of Total |
|---|---|---|---|
| US-US | 3.668 ¢ | 1.700 ¢ | 216% |
| US-Off. | 4.990 | 1.790 | 279 |
| Off.-US | 3.712 | 2.053 | 181 |
| Off.-Off. | 5.086 | 2.018 | 252 |
| Off.-Sou. | 3.690 | 1.888 | 195 |
| Off.-WTL | 3.716 | 2.617 | 142 |
| Off.-SW | 3.139 | 2.267 | 138 |
| Off.-MTP | 2.542 | 2.237 | 114 |

Source:

Statement TD-1
Carload Waybill Statistics 1969
Department of Transportation

(Verified by Sidney M. Carnahan, August 7, 1973.)

OPENING STATEMENT OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.
BEFORE THE

INTERSTATE COMMERCE COMMISSION

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Docket No. 35790

JOINT PETITION FOR DECLARATORY ORDER -
PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION
AND THE LONG ISLAND RAILROAD COMPANY

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Opening Statement Of The
National Industrial Traffic League

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## Preliminary Statement

The factual background underlying this proceeding will in all probability be covered in sufficient detail in the respective statements of the joint petitioners, The Long Island Railroad Co. (LIRR) and General Motors Corporation (GMC). The League, while reserving judgment on whether to put in factual evidence later, will confine its opening statement under modified procedure to a discussion of the key legal issues. When necessary for such discussion, factual matter will be included therein.

## Jurisdiction

The Commission's jurisdiction in this proceeding has been invoked under the provisions of the declaratory

order provision of the Administrative Procedure Act, 5 U.S.C. §554(e), which provides:

> "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

The dispute between the joint petitioners over the reasonable terms for the operation of a switch connection from the line of the LIRR to GMC's private sidetrack at its Bethpage, N. Y., warehouse has resulted in a pending court action. 1/ The court has referred the matter to the Commission for its views.

This proceeding involves primarily an issue arising out of the duty of the LIRR, as a common carrier railroad, to provide a switch connection to private sidetracks imposed by Section 1(9) of the Interstate Commerce Act, 49 U.S.C. §1(9). That statute provides:

> "Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed

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1/ General Motors Corp. v. Long Island R. Co., Civil Action 72C1549, in the U. S. District Court for the Eastern District of New York.

> to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

In this case, the switch connection has been constructed, placed in operation and railroad service is being provided. However, LIRR has requested GMC to execute an industry sidetrack agreement which would require GMC to reimburse LIRR for the cost of maintaining that portion of the sidetrack between the point of switch and the property line of the LIRR's right-of-way, even though

that portion is entirely owned by the LIRR. 2/ When GMC refused to sign the agreement with that provision, LIRR threatened to place the sidetrack out of service. GMC then instituted the court action, and LIRR consented to the entering of a preliminary injunction, and a referral of the matter to the Commission.

Strictly speaking, since the switch connection has been constructed and is being operated, the Commission's jurisdiction under Section 1(9) cannot be invoked. See Ziegler Brothers v. Southern Ry. Co., 157 I.C.C. 660, 663 (1929). Nonetheless, if the Commission does not exercise its discretion and issue a declaratory order under the authority granted by the A.P.A., the LIRR could conceivably proceed to order the track out of service, thus effectively ending the switch connection. In such a case, GMC would then be compelled to file a complaint with the Commission under Section 1(9), seeking an order compelling the LIRR to make the switch connection.

These circumstances establish an appropriate situation for the issuance of a declaratory order, in order to resolve

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2/ The remainder of the sidetrack is located on GMC property, is maintained at GMC expense, and is not in dispute.

an uncertainty about the proper terms for the maintenance of a switch connection. Otherwise, the joint petitioners will only be compelled to return to the Commission in the context of another proceeding brought under Section 1(9). See, e.g., Exempt Status of Precooked and Cooked Poultry, 113 M.C.C. 725 (1971); reversed sub nom., Gold Kist, Inc. v. United States, 339 F.Supp. 1249 (N.D. Ga., 1971); affirmed sub. nom. I.C.C. v. Gold Kist, Inc., ___ U.S. ___, 34 L.Ed.2d 67 (1972). Therefore, the Commission has full authority to determine the questions presented in this proceeding.

The Railroad's Obligation Under Section 1(9) Includes Maintaining At Its Expense A Switch Connection On Its Right-Of-Way

Section 1(9) of the Act was added by the Hepburn Act of 1906, 34 Stat. 584 and was slightly amended by the Mann-Elkins Act of 1910, 36 Stat. 544. Since that time the courts and the Commission have continuously expressed their view that, assuming all other statutory conditions are satisfied, the construction and maintenance of a switch connection (to a private sidetrack) located wholly on a railroad's right-of-way is to be done at its expense.

Such a construction of the statute is consistent with its language. One of the statutory conditions requires the

Commission to find that the switch connection will furnish sufficient business to justify its construction and maintenance. Clearly, the import of this requirement is that the railroad will receive sufficient line haul revenues from the traffic moving via the connection to compensate it for the cost of constructing and maintaining it. In this case, the LIRR obviously must have made such a determination, as it has constructed and operated the switch connection for several years, and has handled substantial quantities of traffic.

A prime example of the interpretation placed on the statute is found in Cleveland, C. C. & St. L. Ry. Co. v. United States, 275 U.S. 404 (1928), affirming J. K. Dering Coal Co. v. Cleveland, C. C. & St. L. Ry. Co., 96 I.C.C. 143 (1925) and 109 I.C.C. 55 (1926). In that case, the shipper had constructed his private sidetrack up to the right-of-way of the railroad. The Commission found, inter alia, that the switch connection should be constructed and maintained by the railroad. See 96 I.C.C. at 153 and 275 U.S. at 406. See also Sioux City Term. Ry. Switching, 241 I.C.C. 53, 70 (1940).

Likewise, in Merchants Refrigerating Co. v. New York Central R. Co., 238 I.C.C. 599 (1940), the Commission said, at page 601:

OPENING STATEMENT OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

> "It is customary, in connection with arrangements for private sidings, for defendant to bear only the cost of building and maintaining the track between the switch point at the junction with the main line and the point where the siding clears the main line."

In this case, the LIRR wishes GMC to assume the cost of maintaining the switch connection up to and including the point of switch, all on the railroad's right-of-way.

More recently, in Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (1964), the Commission, in entering an order requiring the defendant railroad to construct and maintain a switch connection, found, at page 73, that:

> "The entire cost of this connection estimated at $5,300 and which will be located entirely on defendant's property, will be borne by defendant. Complainant will complete the private sidetrack and bear the cost and maintenance of such track which is located on its property. Construction and maintenance of this connection is justified."

These findings by the Commission that a railroad should bear the cost of construction and maintenance of a switch connection, are not discretionary policy choices, but are a reflection of the general duty imposed upon all common carriers by railroad to provide and furnish transportation upon reasonable request. See Section 1(4),

49 U.S.C. §1(4), and Huerfano Coal Co. v. Colorado & S.E.R. Co., 28 I.C.C. 502, 505 (1913). Cf, Schlicher v. Director General, 62 I.C.C. 181, 187 (1921). This duty requires the LIRR to furnish at its expense the facilities necessary to discharge its obligations as a common carrier. It should be fully compensated for the provision of such facilities by the revenues received from the traffic transported over them. It should not, by coercion, compel GMC to reimburse it for the maintenance of the switch connection above and beyond the revenues received for the traffic moving over the switch connection.

## Conclusion

For all of the foregoing reasons, the League respectfully requests the Commission to issue an Order declaring that it has jurisdiction to terminate this controversy between joint petitioners under the Administrative Procedure Act. Furthermore, it should find that General Motors Corporation is not required to bear the expense of maintenance of a switch connection for its private sidetrack, said switch connection being located entirely on the right-of-way of the Long Island Railroad Co.

OPENING STATEMENT OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Dated at Washington, D. C. this 13th day of August, 1973.

Respectfully submitted,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE
425 - 13th Street, N.W.
Washington, D. C. 20004

By: John F. Donelan
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THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Due Date: August 13, 1973

REBUTTAL OF GENERAL MOTORS CORPORATION.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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IN THE MATTER OF

DOCKET NO. 35790

---

JOINT PETITION FOR DECLARATORY ORDER -- PRIVATE SIDETRACK -- GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAIL ROAD COMPANY

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REBUTTAL OF

GENERAL MOTORS CORPORATION

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## INTRODUCTION

Petitioner General Motors Corporation ("petitioner" or "General Motors") will rebut the Opening Statement of Facts and Argument of respondent The Long Island Rail Road Company ("The Long Island" or "respondent") by showing the following:

REBUTTAL OF GENERAL MOTORS CORPORATION

I. That the financial arguments upon which the Long Island relies in defense of its position are largely irrelevant and are germane only insofar as they may relate to the question of whether or not the switch connection carries enough traffic to justify its existence. This the switch connection does, and this freight is profitable to the carrier.

II. That costs on the Long Island are excessively high and that the carrier misallocates costs between passenger and freight operations.

III. That all of the freight moving to the General Motors facility at Bethpage, Long Island, results in income for the Long Island, and that the traffic was shown to be profitable in a recent Long Island "Divisions" case.

IV. That the volume of traffic in question has increased over the years to a high level and is likely to continue at this level, and thus respondent's contentions as to the losses of its freight operations in general do not apply to this high volume, high rated, revenue producing move.

REBUTTAL OF GENERAL MOTORS CORPORATION

V. That the Interstate Commerce Commission has long considered the practice of a carrier's installation and maintenance of a switch connection to a shipper's private sidetrack as a requirement of the Interstate Commerce Act and that this position is supported by statute and cases.

VI. That the sole case cited by the Long Island in support of its position is inapposite and, when read in its entirety, supports the position of General Motors Corporation.

## I. THE FINANCIAL ARGUMENTS OF THE LONG ISLAND RAIL ROAD ARE LARGELY IRRELEVANT. INSOFAR AS THEY DO APPLY, THEY HAVE BEEN SOLIDLY DISPROVEN

The financial arguments upon which the Long Island Rail Road relies in defense of its position are, for the most part, not relevant to the issue in this proceeding. The questions of the poor financial health of the Long Island, its high-passenger deficits, and the questions of whether The Long Island Rail Road should or should not participate in general railroad freight rate increases simply are not related to the issue presently before this Commission. However, since some of these

questions have been raised, they will be dealt with briefly below.

The sole financial argument which is germane to this proceeding is the question of whether or not General Motors has provided enough business over the switch connection to justify the existence of the connection. By the railroad's own admission, the number of cars delivered to the Bethpage facility is well in excess of 500 annually. (Verified Statement of James L. Faraci, Respondent Exhibit D, at p. 1)

This sustained high volume of operations is clearly sufficient business, and the business is indisputably profitable to The Long Island Rail Road as demonstrated by the Verified Statement of Mr. Sidney M. Carnahan (attached hereto as Appendix B), and as explained further below.

## II. COSTS ON THE LONG ISLAND ARE EXCESSIVELY HIGH; ALLOCATION OF COSTS BETWEEN FREIGHT AND PASSENGER OPERATIONS IS HIGHLY QUESTIONABLE; SHIPPERS SHOULD NOT BE PENALIZED BY IMPROPER CHARGES

For whatever the reason, be it historical, political, or both, wages on The Long Island Rail Road are significantly higher than those prevailing on most other rail lines. The

Long Island has admitted this fact.[1/] The Long Island has categorized the wage scales prevailing on its system as "champagne wages" and has admitted that wage settlements since 1966 have been generous.[2/]

The Verified Statement of Mr. John E. Cremmins (attached to Respondent's Opening Statement as Exhibit E), is open to attack on the grounds that The Long Island Rail Road appears to be improperly allocating expenses, with the result that the freight operations show a greater deficit than they should. Mr. Carnahan's Statement (attached hereto and designated as Appendix B) recalculates the allocations and demonstrates that freight operations of respondent are not so dramatic as respondent would contend since a transfer of only a small amount from the passenger expenses will cause a large increase in the freight expenses. Mr. Carnahan's statement reveals that no plausible separation has been made of these expenses.

While the high costs prevailing on the Long Island are unfortunate, receivers of freight which is profitable to

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1/ Reply Brief of Complainant, The Long Island Rail Road Company, Docket No. 35153, The Long Island Rail Road v. The Ahnaphee and Western Ry. Co., et al., dated February 19, 1971, at p. 33, ff.

2/ Id., at p. 34.

the Long Island should not be penalized for management decisions of the carrier which result in excessive costs. Nor should freight customers be called upon to contribute to the revenues of the railroad by paying for services for which published rates apply.

## III. ALL OF THE FREIGHT MOVING TO THE BETHPAGE FACILITY IS PROFITABLE. THE VERIFIED STATEMENT OF MR. REMINGTON IS IN ERROR, AND DOES NOT ESTABLISH THE POINT IT SETS FORTH TO MAKE. THE TRAFFIC IN QUESTION WAS SHOWN TO BE PROFITABLE IN THE "LONG ISLAND DIVISIONS CASE" I.C.C. DOCKET NO. 35153

As shown in the statement of Mr. Carnahan, attached hereto and designated as Appendix B, and as shown in Mr. Carnahan's original Verified Statement in Petitioner's Opening Statement of Facts and Argument, all of the traffic moving to the Bethpage facility is profitable to The Long Island Rail Road.

As Mr. Carnahan points out, Mr. J. J. Remington's Exhibit F, attached to Respondent's Opening Statement, contains several errors. Mr. Remington erred in the following points:

(a) Costs were based on "billed weights" rather than actual weights.

(b) Mr. Remington apparently disregarded the Statement of Respondent's own witness, Mr. Donald M. Kadel (Respondent's Exhibit C) that General Motors "normally only holds cars for 24 hours..." (Respondent's Exhibit C, p. 2).

(c) The cost analysis is made for "the railroads," i.e., all carriers participating in this movement, and not for the Long Island.

(d) Mr. Remington's statement is based upon a freight volume which is neither accurate nor representative.

When these errors are corrected, Mr. Carnahan's recalculation shows this movement to be a profitable one, in general, both for cars originating at Martinsville, W. Va., and those cars originating in Michigan and Ohio. This movement is particularly profitable for the Long Island despite the extraordinarily high costs and "champagne wages" of The Long Island Rail Road.

REBUTTAL OF GENERAL MOTORS CORPORATION

In fact, Mr. Remington's Statement fails to prove the very point which it sets forth to make. The Long Island Rail Road can not be heard to complain that a given movement is a deficit movement "for the railroads," i.e., all carriers participating in the movement, when only the Long Island is a party to the proceeding. The other carriers have not come forth to assert or deny the truth of such allegation. The only possible reason for attempting to portray the movement as a deficit move for all participating carriers is obvious: If such a movement were analyzed on a carrier-by-carrier basis, the figures produced solely for the Long Island segment of the move would show the move to be solidly profitable.

Certain documents in I.C.C. Docket 35153, as described below and in the statement of Mr. Carnahan, attached hereto as Appendix B, show that the auto parts traffic to the Bethpage facility located on the Long Island Rail Road is a good revenue producer for the Long Island.

In The Long Island Rail Road Company v. The Ahnaphee and Western Railway Company, et al., I.C.C. Docket 35153, Exhibit No. 21, Appendix A of Verified Statement of James J. Donohue, General Freight Agent, Lehigh Valley Railroad, a

party defendant in the case, shows some of the typical rates and divisions prevailing on interline movements of eastbound traffic to destinations on the line of The Long Island Rail Road, including movements of auto parts to Bethpage. When revenue per car is allocated on the basis of the division in effect at that time, and the Long Island's costs are subtracted, the traffic is seen to provide excellent revenue for the carrier. Mr. Carnahan demonstrates this profitability of the movement in his statement.3/

## IV. GENERAL MOTORS CORPORATION TRAFFIC TO THE BETHPAGE FACILITY HAS INCREASED IN VOLUME OVER THE YEARS

The Verified Statement of Mr. Faraci (Respondent's Exhibit D) shows a steady and significant increase in traffic delivered by The Long Island Rail Road to the General Motors Corporation facility. (Respondent Exhibit D, p. 1.)

The number of cars has increased from the 1965 total of 88 cars to the 1972 level of 585 cars delivered. In only one year, 1970, was there a significant decline, and the decline can be attributed to the 1970 strike by the United

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3/ Exhibit 21 is part of the record in the case and can be found in Docket 35153 at the Washington, D.C., office of the Interstate Commerce Commission.

Auto Workers against General Motors Corporation. (The strike continued for 114 days that year.)

As the Verified Statement of Mr. William Burke, (designated as Appendix A and attached hereto and made a part hereof) indicates, the volume of traffic delivered at Bethpage may reasonably be expected to remain at the present high level.

Clearly, the contentions of the Long Island as to its financial plight do not apply to a volume movement of high-rated freight which provides badly needed income to the carrier.

## V. THE INTERSTATE COMMERCE COMMISSION HAS LONG LOOKED UPON THE PRACTICE OF CARRIER MAINTENANCE OF A SWITCH CONNECTION SERVING A SHIPPER AS A REQUIREMENT OF THE ACT

The Commission has long recognized the industry-wide practice of a railroad maintaining the switch connection when the connection is located entirely on railroad property. Since passage of Section 1(9) of the Interstate Commerce Act in the early part of this century (34 Stat. 584, (1906)), the Commission and the courts have often stated the view that construction and maintenance of a switch connection located upon the right-of-way of a carrier is an act to be done at the

expense of the carrier. Of course, the shipper is required to furnish sufficient business to the carrier to justify construction of the connection. This the shipper has done. As the Statement of Mr. Faraci demonstrates (Respondent Exhibit D, p. 1), traffic to the Bethpage facility has been increasing annually since 1966 with the sole exception of 1970, a year in which there occurred a major strike against General Motors. That the shipper has met its burden of providing the carrier with sufficient business is indisputable.

Controlling in this regard is Cleveland, C.C. & St. Louis Ry. Co. v. United States, 275 U.S. 404 (1928), affirming J. K. Derling Coal Co. v. Cleveland C.C. & St. Louis Ry. Co., 96 I.C.C. 143 (1925) and 109 I.C.C. 55 (1926). There, shipper had extended his private sidetrack to carrier's right-of-way and the Commission found that the carrier should construct and maintain a switch connection. See also Merchants Refrigerating Co. v. N.Y.C.R. Co., 238 I.C.C. 599 (1940) discussed, infra, and Union Carbide Corp. v. N & W Ry. Co., 323 I.C.C. 65 (1964).

REBUTTAL OF GENERAL MOTORS CORPORATION

## VI. THE MERCHANTS REFRIGERATING CASE UPON WHICH RESPONDENT TRIES TO RELY ACTUALLY SUPPORTS PETITIONER

Respondent cites the Merchants Refrigerating case, 238 I.C.C. 599 (1940), in support of its position. A thorough reading of that case, however, reveals that it supports the position of petitioner quite solidly, and that the section upon which respondent relies is out of context and is distinguishable easily on its facts. In the Merchants case, the carrier was required to construct an elevated spur leading to, and treated as part of, industry's siding. In order to recover its considerable investment, carrier and shipper agreed on rental for the sidetrack crossing municipal property which lay between industry's facility and carrier's main line. The Commission held that the rental of the sidetrack was not a charge published in the carrier's tariff. While rent on a carrier-owned sidetrack may not be a tariff charge here, however, the Long Island seeks to impose a charge for maintenance of ordinary track which composes a switch connection and which lies wholly on the carrier's main line right-of-way. In the same case, the Commission stated that it was customary for the railroad to install and maintain the switch connection, (238 I.C.C. 599, at p. 601):

REBUTTAL OF GENERAL MOTORS CORPORATION

> "It is customary, in connection with arrangements for private sidings, for defendant to bear only the cost of building and maintaining the track between the switch point at the junction with the main line and the point where the siding clears the main line."

No part of the disputed trackage is sidetrack for which rental would be appropriate and no extraordinary expenses were incurred in its construction. Charges for maintenance of these carrier facilities are included in the tariffs of the carrier and are part of the rate base of The Long Island Rail Road. Accordingly, an additional charge for maintenance of track composing a connection which the carrier is required by statute to make, is most certainly an improper charge, and Petitioner prays this Commission so find.

## CONCLUSION

As set forth by Respondent, through statements of its witnesses, the cost analyses and figures of the railroad do not portray accurately the costs to the railroads of moving the freight involved. This is due in part to the failure of The Long Island Rail Road to allocate properly passenger and freight costs.

REBUTTAL OF GENERAL MOTORS CORPORATION

Recomputation of the sample provided by The Long Island indicates that the traffic moving to the Bethpage facility of General Motors is solidly profitable. It becomes clear that the freight in question is a bright spot in the freight operations of the railroad, and that the volume of traffic is likely to continue. The railroad has shown no reason why the Petitioner should be burdened with additional, duplicative, unpublished charges.

The Commission has long recognized the responsibility of the rail carrier to maintain that portion of the switch connection lying entirely upon the carrier's right-of-way. This position is supported by both the statute and the cases. The sole case on which The Long Island relies is inapposite, and when read in its entirety, supports the position of General Motors.

For all of the foregoing reasons, General Motors Corporation respectfully requests this Commission to issue an Order declaring that it has the jurisdiction to terminate this controversy and to find that The Long Island Rail Road is required to bear the expense of maintenance of a switch connection for the private sidetrack of General Motors

Corporation, said switch connection being located wholly upon the right-of-way of The Long Island Rail Road Company, and to further find that The Long Island Rail Road may not suspend service over said switch connection.

Dated at Detroit, Michigan, this 25th day of September, 1973.

Respectfully submitted,

GENERAL MOTORS CORPORATION

BENSON T. BUCK and
LEONARD F. CHARLA
Attorneys for
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3044 West Grand Boulevard
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Of Counsel:

ROSS L. MALONE
3044 West Grand Boulevard
Detroit, Michigan 48202

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Rebuttal of Petitioner General Motors Corporation

upon all parties of record to this proceeding by mailing a copy to each by first-class mail, postage prepaid.

Dated at Detroit, Michigan, this 25th day of September, 1973.

Benson T. Buck

REBUTTAL OF GENERAL MOTORS CORPORATION

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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IN THE MATTER OF

DOCKET NO. 35790

---

JOINT PETITION FOR DECLARATORY ORDER -- PRIVATE SIDETRACK -- GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAIL ROAD COMPANY

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VERIFIED STATEMENT OF

WILLIAM BURKE

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My name is William Burke. I am the same William Burke who submitted the Verified Statement in the Opening Statement of Facts and Argument dated July 24th, 1973.

Records to which I have access in my capacity as Northeast Area Traffic Manager, General Motors Parts Division, show the Bethpage facility actually received 42 freight cars during June 1973. The statement of Mr. Faraci (respondent Exhibit D, page 1) is incorrect in this regard. Mr. Kadel's statement shows 35 cars received

(respondent Exhibit C, page 1). The statements of Mr. Faraci and Mr. Kadel are internally inconsistent and both statements are in error, since they understate the number of cars received.

Records prepared by the demurrage clerk at the Bethpage facility of General Motors Parts Division indicate that 45 cars were unloaded at the facility during June, 1973. These records were made on a day-by-day basis during the normal course of business.

The records indicate that the following number of cars were unloaded for the months shown:

| Month | Cars Unloaded at Bethpage -- |
|---|---|
| March | 52 |
| April | 55 |
| May | 49 |
| June | 45 |
| July | 55 |
| August | 57 |

(Note: January and February 1973 were atypical months due to a strike against the Long Island Rail Road from November 30, 1972 to January 22, 1973.)

It is within my personal knowledge that some of the traffic being received by the Bethpage facility of

GMPD has been floated by lighter across New York Harbor from New Jersey via certain of The Long Island Rail Road's connecting carriers, particularly the Lehigh Valley Railroad.

I know that much of the traffic received at the Bethpage facility of GMPD is routed via Selkirk, New York, via the Penn Central Railroad. The Penn Central Transportation Company formerly operated a float service across New York Harbor which has been discontinued. It is my understanding that this float operation was discontinued on the motion of the Penn Central Transportation Company, and that the Selkirk movement is for the Penn Central Transportation Company's own convenience.

As I explained above, June, 1973, is not a representative month, and the volume of 42 cars received and 45 cars unloaded is below the monthly mean of 48.7 cars received at the Bethpage facility during 1972. The figure of 48.7 cars per month is derived from the chart on page one of Mr. Faraci's statement. This trend has continued through 1973.

REBUTTAL OF GENERAL MOTORS CORPORATION

The statement of Mr. Kadel (Long Island Rail Road, Exhibit F, page 2) that GMPD normally holds cars for a period of 24 hours at its Bethpage facility is correct. This rapid turnover and efficient handling of freight cars at Bethpage helps to minimize carrier costs. It would be absolutely impossible to maintain this 24-hour turnaround time at any team track facility.

As I pointed out in my earlier statement, to receive freight via team track and motor carrier would cause a severe curtailment of the operations of the Bethpage facility since the facility has very limited truck receiving capacity with no provision for physical expansion.

REBUTTAL OF GENERAL MOTORS CORPORATION

VERIFICATION

STATE OF MICHIGAN )
) SS
COUNTY OF WAYNE )

William Burke, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

William Burke

Subscribed and sworn to before me this [illegible] day of September, 1973.

Dolores E. Sliwinski

Notary Public

DOLORES E. SLIWINSKI
Notary Public, Wayne County, Mich.
My Commission Expires Apr. 27, 1975

REBUTTAL OF GENERAL MOTORS CORPORATION

BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

IN THE MATTER OF

DOCKET NO. 35790

---

JOINT PETITION FOR DECLARATORY ORDER --

PRIVATE SIDETRACK -- GENERAL MOTORS CORPOR-

ATION AND THE LONG ISLAND RAIL ROAD COMPANY

---

VERIFIED STATEMENT OF

SIDNEY M. CARNAHAN

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I am the same Sidney M. Carnahan who submitted a Verified Statement which was made a part of General Motors Opinion, Statement of Facts and Argument in this proceeding. I have examined the statements of Mr. John E. Cremmins and Mr. Joseph Remington which purport to show that The Long Island Rail Road loses money on traffic moving to the Bethpage Distribution Center from Martinsburg, West Virginia, and have found that the statistics upon which they rely do not establish that this traffic is of questionable value to the Long Island. To the contrary, when properly computed,

it can be shown by the use of cost figures presented by the Long Island witnesses that revenue received by that carrier for handling parts traffic moving from Martinsburg to Bethpage exceeds the Long Island's cost for providing that service.

Before establishing that fact, however, first I should point out that the statistics presented by Mr. Cremmins, while showing overall freight losses of the Long Island for the years 1966 through 1972, do not show that the Long Island sustained a loss on automobile parts traffic. As it can be seen from Mr. Cremmins' statement (Respondent Exhibit E), the revenue and expense figures are a composite for all traffic handled during that period. Secondly, even though the Long Island's labor costs appear to be correspondingly higher than those for other railroads in the same area, the freight losses shown on Exhibit E are unquestionably affected by the expenses of passenger service which account for a major part of the Long Island's rail operations.

To measure this high wage cost, I have prepared Exhibit A entitled "1972 Wage Comparison" which compares the Long Island Rail Road wage rates with those of the Central of New Jersey. I chose the CNJ for this purpose

as it is nearly comparable to the Long Island as any railroad. Both service the New York area, are relatively small, and both are in financial difficulty. The only minor difference is that while the Long Island extends into nearby Long Island communities to the east of New York, the CNJ extends into nearby New Jersey communities to the west of New York. Despite this strong similarity, Long Island pays wages equal to 117.3% of those paid by CNJ on a straight time basis, or equal to 116.8% of those paid by the CNJ on a "total time paid for" basis.

Furthermore, freight losses as reported to the I.C.C. are highly dependent upon the separation of expenses between freight and passenger services. Although the Commission has published rules for such separation, a certain amount of judgment is allowed in apportioning certain expenses. Due to the exceedingly large passenger service of the Long Island -- actually over 9 times as great as the freight services when measured by revenues -- a transfer of a small amount from the passenger expenses will cause a large increase in freight expenses. In this respect, I have prepared Exhibit B which is an analysis of the operating revenues and expenses of The Long Island Rail Road to test whether the separation of expense between freight and passenger service is realistic.

This analysis does not reveal that a very plausible separation has been made of these expenses. Looking at Exhibit B, it seems inconceivable that freight services operating 5.1% of the car miles, and only 3.4% of the train miles, should be charged with 12% of the operating expenses and 13% of the taxes, while the passenger service operating 94.9% of the car miles and 96.6% of the train miles should bear only 88% of the operating expenses and 87% of the taxes. This does not seem like a realistic apportionment of such expenses, which to my way of thinking, overstate actual freight expenses. The validity of such apportionment is further cast in doubt by the fact that the automobile parts traffic actually makes a contribution to profit for the Long Island ranging from 190% to 201% of fully allocated costs, as will be shown on Exhibit C, which I shall later discuss in greater detail.

Next, I wish to point out that the costs presented by Mr. Remington are not based upon an accurate or representative freight volume. According to his statement, the costs are based upon the billed weight of 38 shipments which moved in June of 1973. While June may have been the most recent period for which statistics are available, that is neither representative nor correct traffic sampling.

REBUTTAL OF GENERAL MOTORS CORPORATION

According to the statement of Mr. James L. Faraci, (Respondent Exhibit D), the Long Island handled 585 cars to Bethpage for General Motors in 1972. Thus, a monthly average of the total year's volume would amount to approximately 49 cars or 29% greater than the 38 car factor used by Mr. Remington. According to Mr. Burke, Eastern Traffic Manager for the Parts Division, who has jurisdiction over the Bethpage facility, June is a relatively light period when compared to the other months of the year and not representative of the traffic movement. Actually, the Bethpage facility received 41 cars in June according to Mr. Burke. Also, predicating the cost study on billed weight rather than the actual carload weight shown on copies of the freight waybills appended to Mr. Faraci's verified statement again shows that the costs prepared by Mr. Remington were overstated. The billed weight of the cars far exceeded the actual weight of most shipments. This can be determined by analyzing the copies of those waybills attached to Mr. Faraci's statement. For example, all shipments were billed at 20,000 pounds or more, whereas the actual weight on the first three waybills is 17,877 pounds, 14,346 pounds and 11,471 pounds, respectively. Averaging out the actual weights for all shipments, the

carload weights were only 13,738 per car rather than the billed weight of 20,000 or more used by Mr. Remington. Naturally, such an approach overstated the operating costs of the rail service performed in handling this precise traffic.

A further inaccuracy in Mr. Remington's cost study resulting in an additional overstatement in costs results from his failure to adjust the cost scales for known operating experience which deviates from the average factor in the cost scales. At page 2 of Mr. Kadel's statement, he points out that General Motors Corporation normally holds cars for no more than 24 hours. The cost scales (Statement No. 1C1-70 Railroad Cost Scales by Territories for the Year 1970), however, provide an average factor of two days for loading and unloading a boxcar at either origin or destination. (Page 153) At page 154, the scales provide for adjustment to this factor when the actual experience is one day instead of two days. In this regard, the scales provide for correction as follows:

> "If it is known that the loading or unloading time is 1.00 day instead of 2.00 days, the active car-days for boxcars becomes 2.80 days instead of 3.80 days and for other cars 3.00 days instead of 4.00 days. Using the Region II costs, for example, adjustments would be as follows: The boxcar-general unequipped and equipped service cost would become $11.82 per car, 73.7 per cent (2.80 divided by 3.80) instead of the territorial average cost of $16.04 or a reduction of $4.22 per boxcar."

As the rules indicate, failure to make such an adjustment overstates the costs.

While I have pointed out numerous defects and inaccuracies in Mr. Remington's cost study, which impair the validity of the result, the principal objection is that the study does not evaluate the Long Island's cost of handling this traffic. Instead it purports to cast out the entire movement from origin to Bethpage with no separation as to relative profit to Long Island as compared to that of the other participating carriers.

Exhibit I to Mr. Remington's Verified Statement computed the variable and fully allocated cost for the carriers west of Fresh Pond and the Long Island and compared those costs with the revenue for all carriers. Nothing was

shown as to the division of revenues to the Long Island, as against other carriers participating in this traffic. An examination of the record in Docket 35153, Long Island Division's case, was made in order to see if this could be developed.

However, the divisions disclosed in that case were via ferry and Long Island City. This service by ferry has subsequently been discontinued, causing this traffic to be now interchanged at Fresh Pond. The Verified Statement of Albert M. Schofield introduced as Exhibit 15 in Docket 35153, at page 9, states the delay in coming to an agreement was due to ". . . the Long Island's insistence on a greater share of the interline revenues . . . ." Accordingly, it is reasonable to believe that the present divisions are not less than those disclosed on Division Sheet 486 under consideration in Docket 35153.

Based on Divisions disclosed in Docket 35153, I have prepared an Exhibit C, "Long Island Revenues and Costs as Compared with Other Participating Roads," which shows this traffic to be relatively far more profitable to Long Island than it is to other participating roads. In all instances, the revenue received by the Long Island on this

traffic bore a relationship to variable costs by 200% or more for all origins except Martinsburg which traffic contributed revenue of 192% of variable costs. By any standard, this must be considered highly profitable traffic.

REBUTTAL OF GENERAL MOTORS CORPORATION

**VERIFICATION**

STATE OF MICHIGAN )
) SS
COUNTY OF WAYNE )

Sidney M. Carnahan, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Sidney M. Carnahan

Subscribed and sworn to before me this 24th day of September, 1973.

Dolores E. Sliwinski

Notary Public
DOLORES E. SLIWINSKI
Notary Public, Wayne County, Mich.
My Commission Expires Apr. 27, 1975

WITNESS CARNAHAN
DOCKET NO. 35790
EXHIBIT A

1972 Wage Comparison
Long Island R.R. v. Central of New Jersey

| | Straight Time Hours | Paid At Straight Time | Paid Per Hour | Total Time Paid For | Total Paid | Paid Per Hour |
|---|---|---|---|---|---|---|
| LONG ISLAND R.R. | | | | | | |
| Executives | 374,419 | $ 4,012,916 | $10.72 | 374,419 | $ 4,012,916 | $10.72 |
| Professionals | 2,105,043 | 11,258,946 | 5.35 | 2,405,770 | 13,002,771 | 5.40 |
| Maintenance of Way | 1,550,036 | 8,226,040 | 5.31 | 1,898,555 | 10,485,064 | 5.52 |
| Maintenance of Equipment and Stores | 3,819,332 | 19,820,054 | 5.19 | 4,719,233 | 25,287,901 | 5.36 |
| Transportation, Other Than Train & Engine And Yard | 806,024 | 4,169,067 | 5.17 | 940,892 | 4,968,433 | 5.28 |
| Transportation, Yard | 169,856 | 876,779 | 5.16 | 214,240 | 1,229,023 | 5.74 |
| Transportation, Train & Engine | 2,608,823 | 15,977,933 | 6.12 | 4,252,746 | 23,411,242 | 5.50 |
| Totals | 11,433,533 | $64,341,735 | $ 5.63 | 14,805,855 | $82,397,350 | $ 5.57 |
| CENTRAL OF NEW JERSEY | | | | | | |
| Executives | 181,771 | $ 1,353,695 | $ 7.45 | 181,771 | $ 1,353,695 | $ 7.45 |
| Professional | 887,124 | 4,113,439 | 4.64 | 1,057,229 | 4,937,732 | 4.67 |
| Maintenance of Way | 451,173 | 1,933,224 | 4.28 | 557,008 | 2,479,571 | 4.45 |
| Maintenance of Equipment and Stores | 889,043 | 3,999,827 | 4.50 | 1,058,141 | 4,888,753 | 4.62 |
| Transportation, Other Than Train & Engine And Yard | 320,781 | 1,464,820 | 4.57 | 392,229 | 1,840,789 | 4.69 |
| Transportation, Yard | 103,156 | 537,244 | 5.20 | 120,562 | 632,758 | 5.25 |
| Transportation Train & Engine | 1,253,021 | 6,220,704 | 4.96 | 1,992,483 | 9,438,901 | 4.74 |
| Totals | 4,086,069 | $19,622,953 | $ 4.80 | 5,359,423 | $25,572,199 | $ 4.77 |
| % Long Island hourly rate is of CNJ | | | 117.3% | | | 116.8% |

Source: Year End Report of Employees, Service and Compensation, I.C.C. Wage Statistics Form A.

REBUTTAL OF GENERAL MOTORS CORPORATION

WITNESS CARNAHAN
DOCKET NO. 35790
EXHIBIT B

THE LONG ISLAND RAIL ROAD
ANALYSIS OF OPERATING REVENUES AND EXPENSES
(In 000's)

| 1972 | Freight | | | Passenger | | | Totals | | | Percent Freight Is Of Total |
|---|---|---|---|---|---|---|---|---|---|---|
| | Solely | Apportioned | Total | Solely | Apportioned | Total | Solely | Apportioned | Total | |
| Revenues | $ 9,190 | - | $ 9,190 | $85,122 | - | $85,122 | $94,312 | - | $94,312 | 9.74% |
| Expenses | | | | | | | | | | |
| Maint. of Way | 871 | 1,541 | 2,412 | 1,454 | 17,926 | 19,380 | | | 21,792 | 11.1% |
| Maint. of Equip. | 1,747 | 488 | 2,235 | 26,918 | 5,643 | 32,561 | | | 34,797 | 6.4% |
| Traffic | 241 | 95 | 336 | 172 | 74 | 246 | | | 581 | 57.8% |
| Transportation | 9,071 | 1,130 | 10,201 | 51,886 | 8,868 | 60,754 | | | 70,955 | 14.4% |
| Miscellaneous | - | - | - | 1,799 | - | 1,799 | | | 1,799 | - |
| General | 625 | 1,830 | 2,455 | 488 | 13,826 | 14,314 | | | 16,769 | 14.6% |
| Total Expenses | 12,555 | 5,083 | 17,639 | 82,718 | 46,337 | 129,055 | | | 146,694 | 12.0% |
| | | | ( 8,449) | | | (43,933) | | | (52,382) | 16.1% |
| Net Rev. RR Opr. | | | | | | | | | | |
| Railway Tax Accruals | 688 | 206 | 894 | 3,849 | 2,131 | 5,980 | | | 6,874 | 13.0% |
| | | | ( 9,343) | | | (49,913) | | | (59,256) | 15.8% |
| RR Operating Income | | | 2,118 | | | 4,612 | | | 6,731 | 31.5% |
| Net Rents | | | (11,461) | | | (54,526) | | | (65,987) | 17.4% |
| Net Loss | | | | | | | | | | |
| Car Miles (Loaded & Empty - Including Motor Car) | | | 2,526 | | | 47,446 | | | 49,972 | 5.1% |
| Train Miles | | | 216 | | | 6,289 | | | 6,505 | 3.4% |

WITNESS CARNAHAN
DOCKET NO. 35790
EXHIBIT C

## Long Island Revenues and Costs
## As Compared with Other Participating Roads

| Costs as Computed by J. J. Remington | Col. 1 Revenue (A) | Col. 2* Long Is. Percent. | Col. 3 Long Is. Div. (Col 1x2) | Col. 4 Other Rd. Divs. (Col 1-2) | Col. 5 Variable Cost Long Is. (A) | Col. 6 Variable Cost Others (A) | Col. 7 Fully Allocated Cost Long Is. (A) | Col. 8 Fully Allocated Cost Others (A) | Col. 9 % Rev. is of V.C. Long Is. | Col. 10 % Rev. is of V.C. Others | Col. 11 % Rev. is of Full Cost Long Is. | Col. 12 % Rev. is of Full Cost Others |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| To Bethpage, N.Y. from: | | | | | | | | | | | | |
| Grand Blanc, Mich. | 239 | 26.2%(B) | 62.6 | 176.4 | 31.1 | 174.6 | 31.5 | 183.9 | 201.3% | 101.0% | 198.7% | 95.9% |
| Pontiac, Mich. | 239 | 26.2% | 62.6 | 176.4 | 31.1 | 172.7 | 31.5 | 181.9 | 201.3% | 102.1% | 198.7% | 97.0% |
| Waterford, Mich. | 239 | 26.2% | 62.6 | 176.4 | 31.1 | 172.7 | 31.5 | 181.9 | 201.3% | 102.1% | 198.7% | 97.0% |
| Flint, Mich. | 239 | 26.2% | 62.6 | 176.4 | 30.9 | 174.4 | 31.1 | 183.7 | 202.6% | 101.1% | 201.3% | 96.0% |
| Lansing, Mich. | 248 | 25.5% | 63.2 | 184.8 | 31.1 | 185.9 | 32.0 | 195.9 | 203.2% | 99.4% | 197.5% | 94.3% |
| Toledo, Ohio | 241 | 27.4% | 66.0 | 175.0 | 31.1 | 177.1 | 31.5 | 186.6 | 212.2% | 98.8% | 209.5% | 93.8% |
| Martinsburg, W.Va. | 152 | 38.4%(C) | 58.4 | 93.6 | 30.4 | 126.8 | 30.7 | 135.1 | 192.1% | 73.8% | 190.2% | 69.3% |

Reference:
~~Column~~ 2 based on Division Sheet 486 Issued by H.R. Hirsh, Tariff Publishing Office (File 1136-31)
(A) Verified Statement of J.J. Remington, Exh. 1
(B) Taken at Flint and Pontiac percentage.
(C) Simple average of Hagerstown, Md., and Winchester, Va.

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

Docket No. 35790

JOINT PETITION FOR DECLARATORY ORDER -
PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION
AND THE LONG ISLAND RAILROAD COMPANY

---

# REPLY STATEMENT OF FACTS AND ARGUMENT OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

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## Preliminary Statement

In its Opening Statement, filed August 13, 1973, The National Industrial Traffic League (League) confined its discussion to the legal issues involved in this proceeding while reserving judgment on whether to put in factual evidence at a later time.

The League now respectfully submits its Reply Statement Of Facts And Argument with the purpose of emphasizing the abnormal position taken by the Long Island Railroad Company, respondent.

The League will show, through the Verified Statement of J.E. Phelan (attached), that the change in the LIRR's policy, from one pursuant to which the LIRR has borne

the cost of maintaining that portion of sidetrack between the point of switch and right-of-way line to one pursuant to which it will not, has in fact not been the policy and practice of the other railroads in the United States, and, is what only could be considered an aberration from the legal maintenance responsibilities of a common carrier by rail.

## Argument

The Long Island Railroad Company, through Witness La Rocco (Exhibit B, Verified Statement of Nicholas C. La Rocco), has testified that, in September of 1970, the LIRR was forced to rescind its policy of bearing the maintenance expense on that portion of sidetrack from the point of switch to the right-of-way line. (Witness La Rocco, Ex. B., p.1) The present policy of the LIRR is to have the maintenance expense of such track borne by the shipper through a contractual sidetrack arrangement.

The League submits that this present policy of the LIRR is not consistent with the policy of most of the railroads in the United States. In his Verified Statement, League Witness J.E. Phelan, General Traffic Manager of Anheuser-Busch, Inc., has stated that

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Anheuser-Busch has never been presented with a side-track agreement which included a demand that the shipper bear the cost of maintaining that portion of the track or the switch connection located on the carrier's property and owned by the carrier. (Witness J.E. Phelan, Verified Statement, p.3) This is of paramount significance due to the fact that Anheuser-Busch has a total of eleven (11) sidetrack agreements with nine (9) different carriers by rail in various locations throughout the country. (Witness J.E. Phelan, Verified Statement, p.2)

## Conclusion

The evidence submitted herewith supports the League's contention that the "new" policy being pursued by the Long Island Railroad Company is at variance with the policy of most of the other rail carriers in the United States.

The League recognizes that the LIRR's deviation from the policy followed by most other common carriers by rail does not make the LIRR's policy illegal per se. The purpose of this Reply Statement of Fact and Argument was limited to emphasizing the fact that the LIRR's policy is a true aberration from the norm.

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

However, the League does believe, and has so stated, that the LIRR cannot require the General Motors Corporation to bear the expense of maintenance of a switch connection for its private sidetrack, said switch connection being located entirely on the right-of-way of the Long Island Railroad Company. (See Opening Statement of The National Industrial Traffic League, August 13, 1973, pp. 5-8).

Dated at Washington, D.C. this 27th day of September, 1973.

Respectfully submitted,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

425 - 13th Street, N.W.
Washington, D.C. 20005

By: John F. Donelan
Frederic L. Wood
914 Washington Building
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Attorneys

A.E. Leitherer, President
August Heist, Vice President
J.E. Bartley, Executive Vice President
J.R. Morton, Chairman, Executive Committee
Donald Boyes, Treasurer
J.E. Phelan, Chairman Committee on Railroad Rates and Practices

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Due Date: September 26, 1973

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Certificate of Service

We hereby certify that we have this 27th day of September, 1973, served a copy of the foregoing upon the parties listed in the Commission Order of June 29, 1973, and all other known interested parties, by mail, postage prepaid, in accordance with the General Rules of Practice.

JOHN F. DONELAN

FREDERIC L. WOOD

REPLY STATEMENT OF FACTS AND ARGUMENT OF THE
NATIONAL INDUSTRIAL TRAFFIC LEAGUE
BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

Docket No. 35790

Joint Petition For Declaratory Order -
Private Side Track - General Motors Corporation and
The Long Island Railroad Company

---

Verified Statement of J. E. Phelan
On Behalf Of The National Industrial
Traffic League

---

My name is J. E. Phelan and my office address is 721 Pestalozzi Street, St. Louis, Missouri 63118. I am General Traffic Manager of Anheuser-Busch, Inc. and Chairman of the Railroad Rates and Practices Committee of The National Industrial Traffic League. As General Traffic Manager, I have complete responsibility for all traffic and transportation matters for my company. I have held my present position for 5 years and for 13 years prior to that served as Assistant General Traffic Manager. I have served on the Railroad Rates and Practices Committee of the League for the last 5 years and am currently completing my second year as its Chairman.

Anheuser-Busch, Inc. has numerous side track arrangements in several locations through out the United States with various railroads. These side tracks have been installed to serve various plants of my company. The

location of each plant, together with the railroad serving it, are as follows:

1. St. Louis, Missouri - Manufacturers Ry. Co.
2. Waverly (Newark), New Jersey - Penn Central Transportation Co.
3. La Metro (Los Angeles), California - Southern Pacific Transportation Co.
4. Tampa, Florida - Seaboard Coast Line R. Co.
5. Jacksonville, Florida - Seaboard Coast Line R. Co.
6. Houston, Texas - Missouri Pacific R. Co.
7. Columbus, Ohio - Penn Central Transportation Company
8. Merrimac, New Hampshire - Boston and Maine Corp.
9. Williamsburg, Va. - Chesapeake and Ohio Ry. Co.
10. Manitowoc, Wisconsin - Chicago and North Western Transportation Co.
11. Lafayette, Indiana - Norfolk and Western Ry. Co.

In some of these cases, the construction costs for the switch connection established by the railroad have been paid for by Anheuser-Busch under a refund provision requiring payment of a specified number of dollars per car over a term of years based on a minimum revenue per

car accruing to the constructing railroad. In other cases, the switch connections have been made entirely at the railroad's expense.

However, none of the side track agreements covering these switch connections contain any provision requiring that Anheuser-Busch bear the costs of maintenance of that portion of the track or the switch connection located on the carrier's property and owned by the carrier. In none of these cases have we ever been presented with a demand for such a provision in the side track agreement.

The apparent practice of the Long Island Railroad Company of including such a provision in their side track agreements is completely contrary to the practice of most other railroads in the United States.

J. E. PHELAN

INITIAL OPINION OF THE INTERSTATE COMMERCE COMMISSION.

No. 35790 THE LONG ISLAND RAIL ROAD COMPANY

SERVICE DATE

MAY 21 1974

# Interstate Commerce Commission

**Certificate of Service**

The SECRETARY of the Interstate Commerce Commission hereby certifies that the attached initial decision of the Administrative Law Judge has been filed with and duly made part of the record herein and has this date been served upon all known parties in the manner provided by law and the regulations of this Commission.

Exceptions to said decision, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C. 20423, and served on all other parties of record within 30 calendar days (20 days if there are no other parties) from the date of service shown above. Replies thereto may be filed within 20 calendar days after the final date for filing exceptions. If either date falls upon a Saturday, Sunday, or legal holiday, then the applicable pleading must be filed by the end of the next business day.

If no exceptions are filed to the initial decision, and it is not stayed by the Commission, the initial decision becomes the order of the Commission by operation of law upon expiration of the period for filing of exceptions. The parties to this proceeding are warned that it should not be assumed that the initial decision has become effective as the order of the Commission by operation of law until a notice to that effect has been received.

In addition, any new operation to be authorized by the initial decision, if it becomes the order of the Commission by operation of law, may not be commenced until a certificate, permit, or license, as the case may be, has actually been issued by the Commission. A certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder as specifically set forth in the initial decision.

Robert L. Oswald

ROBERT L. OSWALD
Secretary

(SEAL)

INITIAL OPINION OF THE INTERSTATE COMMERCE COMMISSION

OH

INTERSTATE COMMERCE COMMISSION

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INITIAL DECISION

---

No. 35790

JOINT PETITION FOR DECLARATORY ORDER -
PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION AND
THE LONG ISLAND RAILROAD COMPANY

---

Upon joint petition for a declaratory order, found that (1) respondent cannot lawfully require petitioner to bear the expense of maintaining a switch connection located on railroad property and (2) respondent cannot lawfully stop rail service to petitioner's siding upon refusal of petitioner to bear the expense of maintaining respondent's switch connection. Proceeding discontinued.

Benson T. Buck, Leonard F. Charla, and Ross L. Malone for petitioner.
Richard H. Stokes and George M. Onken for respondent.
John F. Donelan and Frederic L. Wood for intervener.

By Richard S. Ries, Administrative Law Judge:

Pursuant to an order of the United States District Court for the Eastern District of New York, Civil Action No. 72C 1549, General Motors Corporation, herein referred to as "petitioner", and The Long Island Railroad Company, herein referred to as "respondent", filed a joint petition on March 5, 1973, seeking a declaratory order under section 554(e) of the Administrative Procedure Act to settle an existing controversy concerning various issues within the primary jurisdiction of the Interstate Commerce Commission. The issues raised by the joint petition relate to matters arising under section 1 of the Interstate Commerce Act, including section 1(9) thereof.

By order dated June 29, 1973, the Commission directed that this matter be handled under the modified procedure. The National Industrial Traffic League intervened in support of the petitioner. Opening statements of fact and argument were filed by all parties, which included verified statements of witnesses and exhibits; a rebuttal statement was filed by General Motors; and the Traffic League was permitted to late file its reply statement. By order dated April 1, 1974, the proceeding was referred to this Administrative Law Judge for an initial decision.

INITIAL OPINION OF THE INTERSTATE COMMERCE COMMISSION

No. 35790

## The Parties

The petitioner is a Delaware corporation with its principal offices in Detroit, Mich. For business reasons, it functions through several unincorporated divisions, one of which is the General Motors Parts Division. The Parts Division carries on warehousing, sales, and distribution operations on premises located within the municipality of Bethpage, Nassau County, N. Y. Said premises are located on a line of respondent's railroad which delivers the bulk of petitioner's inbound freight. The Parts Division provides major replacement parts to General Motors dealers throughout the Metropolitan City of New York and portions of the outlying areas.

The respondent is a class I common carrier by railroad, with its principal offices at Jamaica Station, in the City of New York, County of Queens, N. Y., transporting freight and passengers in interstate and intrastate commerce. Respondent has rail lines operating in the Counties of Suffolk, Nassau, Queens, Kings, and New York, all in the State of New York. It maintains interchange connections with other common carriers by rail at Long Island City and Fresh Pond Junction for the interstate transportation of freight shipments to and from points in Long Island.

## Statement of Facts

Respondent presently serves petitioner's premises by a switch connection and private siding located on the eastbound track of respondent's main line with a facing point switch. The private sidings at Bethpage are under the jurisdiction of the district freight agent in Hicksville (3 miles distant) where a modern public team track facility is maintained with a 25 freight car capacity. At Farmingdale, about 2 miles eastward from Bethpage, respondent maintains a smaller public team track facility with an 8 car capacity which is under the jurisdiction of the district freight agent at Brentwood.

Since 1965 respondent has been serving petitioner's operations at Bethpage via a switch connection located on respondent's property leading from the railroad line to a sidetrack located on property of petitioner which sidetrack is operated and maintained by petitioner. The switch connection was originally established voluntarily in accordance with section 1(9) of the act, which reads as follows:

> 1(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such

> connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

A sidetrack agreement dated April 10, 1972, was submitted to petitioner by the respondent for signature providing that the sidetrack, which is inclusive of the switch connection, located on railroad property shall be maintained by respondent and the cost thereof to be paid by the petitioner. Upon petitioner's refusal to execute the said agreement, the respondent served petitioner with notice that on and after November 15, 1972, the sidetrack would be placed out of service. If such threatened action was to occur, petitioner's rail car deliveries would be suspended at its private siding requiring such shipments to be received at respondent's public team track facility at Hicksville. Thus petitioner filed a complaint in the United States District Court for the Eastern District of New York seeking a restraining order against the railroad's proposed action to cease serving the petitioner. On December 7, 1972, the Court entered a temporary restraining order against the railroad to remain in effect pending a decision of the issue by the Commission.

## The Issue Involved

The issue here involved is whether or not it is lawful for a railroad to require a shipper to bear the entire expense of maintaining a railroad owned switch connection between an industrial sidetrack and the carrier's main line, even though the switch connection lies upon the property and right-of-way of the carrier.

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Subsidiary to the foregoing issue, is the question of whether or not the respondent has a right to refuse to serve the industrial sidetrack if petitioner refuses to execute the sidetrack agreement tendered it by respondent.

Question of Commission's Jurisdiction

The Traffic League points out that, strictly speaking, the Commission's jurisdiction under section 1(9) of the act cannot be invoked in the instant situation, since the switch connection has been constructed and is being operated. Section 1(9) empowers the Commission to require the installation and operation of a switch connection by a railroad under certain conditions. See Ziegler Brothers v. Southern Ry. Co., 157 I.C.C. 660, 663 (1929). Nevertheless, the League concludes that under the circumstances here, the issuance of a declaratory order to resolve the controversy is appropriate. The Judge agrees with that conclusion. Otherwise, if the Commission were to refuse to exercise its discretion to issue a declaratory order under the authority granted by section 554(e) of the Administrative Procedure Act, the respondent could conceivably proceed to take the track out of service, thus, effectively ending the switch connection. The petitioner would then be compelled to file a complaint with the Commission under section 1(9), seeking an order directing the respondent railroad to make the switch connection. Under the circumstances, the Judge finds that the Commission has the authority to determine the questions in issue in this proceeding.

Contentions of Respondent

Prior to 1954, the practice of the respondent was to require industries to bear the entire cost of maintaining private sidings and switch connections even though portions thereof were located on respondent's property. In November 1954, that policy changed in order to meet the increasing competition of other modes of transportation and to attract additional industry to Long Island. Under the new policy the industry paid the cost of constructing that portion of the sidetrack beyond the right-of-way line. Also the railroad was responsible for the maintenance cost of that portion of the sidetrack between the point of switch and the right-of-way line. In September 1970, due to soaring deficits from freight operations, respondent recinded the new policy and reverted back to its pre-1954 policy which required industries to bear the entire cost of maintaining the private sidings and the switch connections. Since that date 169 sidetrack agreements out of a total of 278 have been renegotiated to reflect the latest policy. The average cost of maintaining a main track switch connection such as the one for petitioner is shown to be $2,908. The average cost of maintaining private siding trackage on railroad property is 92 cents per linear foot. In the case of petitioner, there is 390 linear feet of siding trackage on respondent's property

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which would bring the average annual maintenance expense to $3,266.80.

Respondent shows that switching cars onto petitioner's sidetrack is more costly and time consuming than switching to the public team track at Hicksville. According to respondent's count during 1971 and 1972, an average of some 10 or 11 cars of auto parts per week were switched to petitioner.

The main theory of respondent's position is the financial condition of the railroad. In the last few years freight losses have ranged from 6 to 11 million dollars annually. Moreover, a cost analysis prepared by a respondent witness concludes that petitioner's type of traffic is extremely marginal so far as producing any profit to the railroad in light of the costs of maintaining the switch connection and trackage.

Contentions of Petitioner

The petitioner's position is based upon the grounds that the switch connection and private siding located on respondent's property is a facility which respondent is obligated to own and maintain as a common carrier by railroad under the provisions of section 1 of the act; that the costs of maintaining track lying upon the railroad right-of-way is a cost which has already been included in the railroad's rate base for which respondent is reimbursed; that petitioner is willing and does maintain all track lying upon its own property; that respondent is obligated to continue rail service to petitioner until the rates for such service are permitted to be canceled or service is discontinued in accordance with the requirements of the Interstate Commerce Act; and that to accede to respondent's demand would constitute a violation of section 6 of the act since the maintenance charge at issue here is not reflected anywhere in respondent's tariffs but rather is a part of respondent's operating cost.

Contrary to respondent's claim that revenues derived from transporting automobile parts are marginal, petitioner shows that revenues from automobile parts exceed variable costs by 139 percent as compared with the ratio of revenue to costs of all commodities of 120.5 percent. Petitioner shows the revenue on automobile parts is higher whether measured by revenue per car, revenue per 100 pounds; revenue per car mile or per ton mile.

Respondent is deliverying on the average of 15 freight car loads of automotive parts weekly or in excess of 500 car loads annually to petitioner's facility at Bethpage. These cars originate at points in the midwest principally Michigan, Ohio and Indiana. Since the Bethpage facility was designed to receive its incoming freight by rail and due to the distance from sources of supply, inbound shipments by truck are stated to be unfeasible, on a volume basis. Thus,

it is contended that suspension of rail deliveries by respondent to petitioner's facility at Bethpage would cause irreparable injury by prohibiting it from maintaining an adequate supply of parts essential to meet the demands of its dealers and customers.

Finally, petitioner shows it has over 150 facilities with railroad switch connections. Many are served by more than one carrier but in no instance, other than respondent, has there been a demand that petitioner maintain track on land owned by or leased to a rail carrier. The Traffic League presented a witness that stated the experience of Anheuser-Busch, Inc. with 11 facilities requiring switch connections with various railroads throughout the United States. In no instance has a railroad demanded the cost of maintaining the switch connection located on the carrier's property.

## DISCUSSION AND CONCLUSIONS

Carload freight is ordinarily delivered by a rail carrier in one of two ways: the car may be placed on public team tracks, where the consignee may come and get his freight; or it may be placed on a private siding beside which the consignee's facility is located. In the instant proceeding respondent has been serving petitioner's facility via a switch connection located on railroad property, leading from respondent's railroad line to a sidetrack located on property of petitioner.

Section 1(9) of the act was added by the Hepburn Act of 1906 and was slightly amended by the Mann-Elkins Act of 1910. It is this section of the act in which the Commission's power over switch connections is found. In pertinent part section 1(9) provides that any common carrier subject to the act "upon application of any * * * shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such * * * private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same * * *."

The switch connection was established in 1965 on a voluntary basis in accordance with section 1(9) of the act. It may be assumed that the conditions prerequisite to the construction of the switch connection were met in the opinion of the railroad or its construction would not have been authorized. Thus, the present state of affairs is that a switch connection has been constructed and is in operation but unless petitioner agrees to pay the cost of maintenance, respondent threatens to cease rail service.

Respondent cites Merchants Refrigerating Co. v. N. Y. Central R. R., 238 I.C.C. 599, to support the proposition that it has the legal right to assess a charge against petitioner for the switch connection. Having reached that conclusion,

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respondent believes that the only issue before the Commission is whether or not under all of the circumstances pertaining to the requirement that petitioner bear the entire cost of maintaining the switch connection and trackage is reasonable and whether or not upon the refusal of petitioner to execute a standard siding agreement with reasonable terms, respondent may refuse to service the siding.

A reading of the Merchants case, discloses it to be distinguishable from the instant proceeding. In the Merchants case, the rail carrier was required to construct an elevated spur leading to, and treated as part of, the industry's siding. In order to recover its investment, which was considerable, the rail carrier and the shipper agreed on a rental charge for the sidetrack crossing municipal property which lay between the industry's facility and carrier's main line. The railroad was the only party that could obtain a franchise from the City of New York to run a railroad across a public street. The following language of the Commission's opinion at page 604 is relied upon in particular:

> This is an arrangement to connect defendant's line with complainant's private siding, and to provide for the continuance and upkeep of the spur track. It is not a contract for transportation itself, or for the movement of particular shipments. The rent is payable even if no shipments are made. * * * Section 6 of the act does not require the publication in tariff form of the terms upon which a switch connection is to be built and operated.
>
> We find that the collection of the rent in addition to freight charges based on defendant's tariff rates to and from complainant's warehouse does not represent an overcharge, nor result in unreasonable or unduly prejudicial freight charges. The complaint will be dismissed.

Respondent is of the opinion that section 1(9) of the act contemplates a carrier may make a reasonable charge for the maintenance of a switch connection, and that the Merchants case upholds that principal. While rent on a carrier-owned sidetrack was found reasonable in the cited case, in the instant proceeding, respondent seeks to impose a charge for maintenance of ordinary track which composes a switch connection, voluntarily constructed and in operation, and which lies wholly on respondent's main line right-of-way. At page 601 of the Merchants case, the Commission stated:

> Section 1(9) of the Interstate Commerce Act provides that a carrier may charge reasonable compensation for a switch connection. The spur, which is in part a switch

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> connection, would not have been necessary but for the private sidings of complainant and the National Biscuit Company. It is customary, in connection with arrangements for private sidings, for defendant (the railroad) to bear only the cost of building and maintaining the track between the switch point at the junction with the main line and the point where the siding clears the main line.

Here, no part of the disputed trackage is sidetrack for which rental would be appropriate and no extraordinary expenses were incurred in its construction. Charges for maintenance of these carrier facilities, which are a necessary part of the transportation service, are included in the tariffs of the carrier and are a part of the rate base of the Long Island Railroad.

Petitioner's belief that to accede to respondent's demand would constitute a violation of section 6 of the act is well taken. Section 6 requires all rates and fares to be filed with the Commission and obligates the carrier to keep open to public inspection schedules showing its rates and fares. Strict adherence to the published rates is required. All deviations, in the form of rebates or otherwise, are forbidden. Section 6 provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time." The published rate is the only legal rate.

Once a switch connection is established between a railroad and a private industrial sidetrack of an industry the carrier holds itself out to perform the service as respondent has done by participating in published line-haul rates. The Supreme Court of the United States has summarized a railroad's obligation in this regard as follows:

> The general rule is that it is the responsibility of the carrier, as part of the transportation service caused by the line-haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee * * * in the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding. See Sec'y. of Agriculture v. United States, 347 U.S. 645, 647.

It is implicit under the requirements of section 1 of the act that transportation service established thereunder may not be summarily or arbitrarily canceled and discontinued as threatened by the respondent as long as respondent continues to tender sufficient business to justify the switch connection.

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Finally, any notion on the part of respondent that its financial condition alters its obligations to shippers under section 1(9) of the act, is clearly unfounded. No provision is made in the statute for different conditions to apply to those rail carriers which do not enjoy profitable operations.

Upon consideration of all the evidence, the Administrative Law Judge finds that the Commission has the authority under the Administrative Procedure Act to determine the questions in issue in this proceeding; that respondent cannot lawfully require petitioner to bear the expense of maintaining a switch connection including sidetrackage located entirely on the right-of-way of respondent; that respondent cannot lawfully stop servicing the petitioner's facility where petitioner refuses to execute a sidetrack agreement obligating it to bear the expense of maintaining respondent's switch connection; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Requested findings not discussed in this decision nor reflected in the findings and conclusions have been considered and found not justified.

Since this proceeding is the subject of a pending court action, it will be discontinued.

Premises considered, it is the ORDER of the Administrative Law Judge that the proceeding be, and it is hereby, discontinued.

Dated at Washington, D. C., this 6th day of May, 1974.

By the Commission, Richard S. Ries, Administrative Law Judge.

ROBERT L. OSWALD,

Secretary.

(SEAL)

EXCEPTIONS OF RESPONDENT, THE LONG ISLAND RAIL ROAD CO., TO THE INITIAL DECISION OF INTERSTATE COMMERCE COMMISSION.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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JOINT PETITION FOR DECLARATORY ORDER - PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAILROAD COMPANY

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Docket No. 35790

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EXCEPTIONS OF RESPONDENT THE LONG ISLAND RAIL ROAD CO. TO THE INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD S. RIES

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## Preliminary Statement

Pursuant to an order of the United States District Court for the Eastern District of New York, Civil Action No. 72C1549, General Motors Corporation (herein referred to as "GM"), and The Long Island Railroad Company (hereinafter referred to as "LIRR"), filed a joint petition on March 5, 1973, seeking a declaratory order under Section 554(e) of the Administrative Procedure Act to settle an existing controversy concerning various issues within the primary jurisdiction of the Interstate Commerce Commission. The issues raised by the joint petition relate to matters arising under Section 1 of the Interstate Commerce Act, particularly Paragraph 9 thereof.

EXCEPTIONS OF RESPONDENT, THE LONG ISLAND RAIL ROAD CO., TO THE INITIAL DECISION OF INTERSTATE COMMERCE COMMISSION

By order dated June 29, 1973, the Commission directed that this matter be handled under the modified procedure. The National Industrial Traffic League (hereinafter "NIT"), intervened in support of GM. Opening statements of fact and argument were filed by all parties, which included verified statements of witnesses and exhibits; a rebuttal statement was filed by GM; and NIT was permitted to late file its reply statement. By order dated April 1, 1974, the proceeding was referred to Administrative Law Judge Richard S. Ries for an Initial Decision which he rendered under date of May 6, 1974, and which was served under date of May 21, 1974. At the request of the LIRR, the time to file exceptions to the Initial Decision of the Administrative Law Judge was extended to July 22, 1974.

## STATEMENT OF EXCEPTIONS

The respondent LIRR respectfully asserts that Administrative Law Judge Richard S. Ries, in his Initial Decision herein dated May 6, 1974, erred in the following respects and particulars:

1. The Administrative Law Judge erred as a matter of law in holding that the LIRR cannot lawfully require GM to bear the expense of maintaining a switch connection including side trackage located entirely upon the right-of-way of LIRR.

2. The Administrative Law Judge erred as a matter of fact and law in finding and holding that the charges for the maintenance of a switch connection including side trackage located upon the right-of-way of LIRR are included in the tariffs and are part of the rate base of the LIRR.

EXCEPTIONS OF RESPONDENT, THE LONG ISLAND RAIL ROAD CO., TO THE INITIAL DECISION OF INTERSTATE COMMERCE COMMISSION

3. The Administrative Law Judge erred as a matter of law in holding that the LIRR could not lawfully stop serving the GM siding where GM refuses to execute LIRR's standard sidetrack agreement obligating GM to bear the expense of the maintenance of the sidetrack and switch connection.

## ARGUMENT IN SUPPORT OF EXCEPTIONS

Exception 1. The Administrative Law Judge erred as a matter of law in holding that the LIRR cannot lawfully require GM to bear the expense of maintaining a switch connection including side trackage located entirely upon the right-of-way of LIRR.

The applicable statutory law governing the obligation of common carriers by rail in regard to the construction, maintenance and operation of private siding switch connections is found in Section 1(9) of the Interstate Commerce Act (49 U.S.C. §1(9) ), hereinafter referred to as the Act. Said Section 1(9) of the Act reads in pertinent part as follows:

> "Any common carrier subject to the provisions of this part, upon application of any...shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such...private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of same;....If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application in writing by any such shipper..., such shipper...may make complaint to the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate

> the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor...." (emphasis added)

The Administrative Law Judge at sheet 3 of his Initial Decision of May 6, 1974, stated the primary issue involved herein in the following terms:

> "The issue here involved is whether or not it is lawful for a railroad to require a shipper to bear the entire expense of maintaining a railroad owned switch connection between an industrial sidetrack and the carrier's main line even though the switch connection lies upon the property and right-of-way of the carrier."

At sheet 9 of his aforesaid Initial Decision, the Administrative Law Judge, inter alia, held:

> "...that respondent cannot lawfully require petitioner to bear the expense of maintaining a switch connection including sidetrackage located entirely on the right-of-way of respondent;"

A. The Initial Decision of The Administrative Law Judge is Contrary to the Plain Language of Section 1(9)

A reading of Section 1(9) makes it clear that the Statute definitely contemplates that under certain circumstances a railroad may properly and lawfully require a shipper to bear the expense of maintaining a private siding switch connection even though such switch connection and associated trackage are located upon the railroad's right-of-way. The language emphasized in the portion of Section 1(9) quoted above makes this obvious otherwise why would Congress have used such language as:

> "...maintain and operate upon reasonable terms a switch connection..."
>
> "...the Commission...shall determine...the reasonable compensation therefor...."

As the United States Supreme Court has succinctly expressed it:

> "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."
> U.S. v. Standard Brewery, 251 U.S. 210, at 217 (1919).

As viewed by the Administrative Law Judge in his Initial Decision, the words of the Statute referring to "reasonable terms" and "reasonable compensation" are superfluous and without significance or meaning. This is prejudicial error of law on the part of the Administrative Law Judge and requires correction upon review.

B. The Initial Decision of the Administrative Law Judge Conflicts with Prior Decisions of the Commission

In holding as a matter of law that the LIRR could not require GM to bear the expense of maintaining the switch connection, the Administrative Law Judge relied upon an erroneous and faulty distinction between the instant case and the prior decision of the Commission in Merchants Refrigeration Company v. N.Y. Central RR Co., 238 ICC 599 (Div. 3-1940). The distinction relied upon by the Administrative Law Judge is based upon what the Administrative Law Judge views as where "...extraordinary expenses were incurred in its construction" (sheet 8) and there is a normal private r detrack connection. In

making this distinction the Administrative Law Judge carefully quoted a portion of a paragraph on 238 ICC at 601 and ignores the opening sentence of the paragraph which flatly states:

> "Section 1(9) of the Interstate Commerce Act provides that a carrier may charge reasonable compensation for a switch connection."

There is no hedging or qualification in this sentence and it does not limit reasonable compensation to those situations where extraordinary expense is involved.

Further, the Administrative Law Judge completely ignored the language of Division 3 at 238 ICC 604 where it stated:

> "This is an arrangement to connect defendants' line with complainants private siding and to provide for the continuance and upkeep of the spur track. It is not a contract for transportation itself or for the movement of particular shipments. The rent is payable even if no shipments are made. It is beyond the jurisdiction of this Commission. Ziegler Bros. v. Southern Ry. Co., 157 ICC 660. Section 6 of the Act does not require the publication of the terms upon which a switch connection is to be built and operated."

The Ziegler case cited by Division 3 in the above-quoted language involved a levy by the Southern Railway Co. of charges over a period of time to cover the costs of installing upon its right-of-way a normal switch connection for a private siding. The Commission, Division 5, in dismissing a complaint alleging the unreasonableness of such charges, said in respect to Section 1(9) of the Act at 157 ICC 662:

> "The first part of the foregoing quotation sets forth the duty of a common carrier relative to the construction of switch connections, and the latter part authorizes us to require the installation of switch connections, subject to certain conditions precedent, only when the carrier 'shall fail to install and operate any such switch or connection' and under such circumstances to determine the reasonable compensation therefor. It does not authorize us to determine what a reasonable charge would be for a switch connection that has been installed and in operation. Our jurisdiction extends only to the consideration of the installation of switch connections when carriers refuse or fail to install such connections. The instant case does not fall within this class as the defendants did not refuse or fail to install the switch connection for complainants at Rutherfordton.
>
> "No evidence was introduced in support of the allegation of undue prejudice.
>
> "We find that we do not have jurisdiction to determine the lawfulness of charges collected by defendant for installing a switch connection at Rutherfordton. Therefore the complaint will be dismissed."

Thus, in 1929, the Commission recognized the right of a railroad to charge for the installation of a normal switch connection on its right-of-way and refused to interfere with the collection of such charges. Eleven years later, in Merchants Refrigeration, the Commission specifically held that the charges or rent for the maintenance and upkeep of spur trackage owned by the railroad and part of its right-of-way was lawful and did not have to be published in a tariff.

Even though, as recognized in Merchants Refrigeration, it is customary in the industry for a railroad to bear the cost of maintaining a switch connection for a private siding, there can be no question but that it is not unlawful

per se for a railroad to levy reasonable charges against the shipper to cover such maintenance expense. In this respect, the Administrative Law Judge erred and his Initial Decision must be set aside since the basic issue before the Commission was whether or not the charge was reasonable or not. However, as Ziegler, supra, pointed out, that determination was beyond the jurisdiction of the Commission.

The Administrative Law Judge, upon referral of the matter by the District Court, should have limited himself to a finding that under prior Commission decisions, as well as Section 1(9) of the Act, the railroad had a right to impose and collect reasonable charges to cover the expense of maintaining the switch connection. To the extent that the District Court requested the advice of the Commission in regard to the reasonableness of the charges sought by the LIRR, the Administrative Law Judge properly should express a view on the subject, but only in conformity with the law and facts.

Exception 2. The Administrative Law Judge erred as a matter of fact and law in finding and holding that the charges for the maintenance of a switch connection including side trackage located upon the right-of-way of LIRR are included in the tariffs and are part of the rate base of the LIRR.

As indicated above, the Administrative Law Judge erred in his interpretation of Section 1(9) and of the prior Commission case law. These errors he compounds by misinterpreting the facts and the law regarding the maintenance charges and the tariff rate bases of LIRR and he further compounds these errors by refusing to consider the financial condition of LIRR in evaluating

the reasonableness of the charges.

In making his erroneous holdings and findings, the Administrative Law Judge at sheet 8 of his Initial Decision said:

> "Charges for maintenance of these carrier facilities, which are a necessary part of the transportation service, are included in the tariffs of the carrier and are a part of the rate base of the Long Island Railroad."

The Administrative Law Judge erred in finding that these facilities are a necessary part of the transportation service, that the maintenance charges are included in the tariffs of the LIRR and that such charges are part of the rate base of the LIRR. Further, such findings are not only erroneous, but they are contrary to the uncontroverted facts of record. These findings are not supported by even a scintilla of evidence and, thus, are arbitrary, capricious and unreasonable and the Initial Decision of the Administrative Law Judge must be set aside on this ground alone.

A. The Operation and Maintenance of a Private Siding Switch Connection is not an Essential or Necessary Part of the Transportation Service.

Basically the transportation service obligation of a common carrier by rail is to transport freight from a given station or interchange point to another station or interchange point. In completing its transportation service at a station, the carrier must, of course, tender delivery of the freight. The basic obligation in this regard is fulfilled by placement of the car on a team track or public delivery track. Placement on a private siding is an extra

frill usually for the benefit of the shipper and oftentimes at additional expense to the carrier.

As was pointed out in the LIRR's Opening Statement of Facts And Argument submitted August 24, 1973, the LIRR maintains a modern team track facility with a 25-car capacity at Hicksville (3 miles distant) and a smaller facility with an 8-car capacity at Farmingdale (2 miles distant).[1] The LIRR also pointed out in its aforesaid Opening Statement that the LIRR has an additional operating expense of $10.40 to $4.46 per car in placing cars at GM's plant at Bethpage when compared with placement at the public team track at Hicksville.[2] The placement of these cars at GM's private siding at Bethpage rather than at Hicksville is, thus, for the financial convenience and benefit of GM. Public team track delivery may not be in the best interest of GM, but that does not mean or imply that GM cannot receive its freight by such means.

The rates of the LIRR are based upon delivery at a station and they do not differentiate between public delivery track and private siding delivery. The LIRR fulfills its transportation obligation as completely by public team track delivery as it does by private siding delivery. Therefore, the maintenance of the GM private siding switch connection is not essential or necessary

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1. Sheet 2 of Initial Decision of Administrative Law Judge.

2. See sheet 5 of Initial Decision of Administrative Law Judge. This evidence was not controverted by GM or NIT.

to the performance by LIRR of its transportation service obligations although it might be desirable to GM.

It is a preferential service for GM with substantial benefit to GM, but is a service performed at substantial additional cost to LIRR and as will be shown below without proper compensation.

B. The Maintenance Charges Are Not Included in Either the Tariffs Nor in the Rate Base of LIRR

The LIRR, in its Opening Statement, put in evidence, which was uncontroverted, that prior to 1954, the uniform practice of LIRR was to require shippers to bear the entire cost of maintenance of private sidings including the switch connection and without regard to whether or not it was on the right-of-way.

GM dragged in the red herring that because the Uniform System of Accounts required the railroads to charge into their accounts these maintenance expenses that they were, therefore, included in the rate base. What GM conveniently overlooked and, as did the Administrative Law Judge in following this false trail, is that the credits from shipper payments would also be credited to this account and, thus, to the extent that payments equalled expenses they washed each other out and such expenses were not included in the rate base.

During the period 1954 to 1970, when the LIRR reverted to its policy of requiring all shippers with private siding to bear the full maintenance cost of the switch connections, most of the existing agreements remained in effect and the

maintenance payments received were charged as credits against the expenses. Since 1970, of course, uniformly this policy has been followed and all side-track agreements not in conformity thereto, have been modified or are in the process of being modified.

Further, since 1969 the LIRR has refused to concur in the general rate increases imposed by the other railroads[3] and it has not furnished any data or figures to these carriers for use in computing the rate bases for any of the general freight rate increases.

Consequently, the costs of maintaining the GM siding at Bethpage are definitely not included within the rate base or tariff schedules of LIRR and it was error for the Examiner so to find. The fact is GM is receiving a preferential free ride for private siding service which benefits GM substantially, but which imposes an extra and unfair burden of expense on LIRR. The Commission should not follow the Initial Decision of the Administrative Law Judge, which, in effect, requires the deficit ridden LIRR to subsidize a wealthy corporate giant such as GM.

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3. The X 262, 265, 267 and 281 increases, insofar as they pertain to LIRR, are presently the subject of litigation seeking to set aside such increases. The LIRR "flag-out" from X 295, X 303 and X 305, was honored, and these general increases do not apply to LIRR traffic. X 299 (Sub. 1) and X 301 were increases to recover specific costs, i.e. railroad retirement increases and fuel cost increases and do not reflect a recovery of other costs.

C. LIRR Could Not Recover The Private Siding Switch Maintenance Costs Through Its Tariff Rates.

As was recognized by the Commission itself in Uneven Effects of General Increases, Ex Parte No. 270 (Sub. No. 3) and in Increases In Freight Rates and Charges To Offset Retirement Tax Increases - 1973, Ex Parte No. 299, general rate increases, for a number of reasons, have an uneven effect upon individual carriers with some strong carriers obtaining "windfall" profits and some weaker carriers failing to recover their full costs. The LIRR has long recognized these facts which are primary among its reasons for flagging out of the general increases[4] and when Congress, in Public Law 93-69, made changes in the Interstate Commerce Act, the LIRR was able to impose a general rate increase on its traffic in the form of a terminal surcharge which allowed it to recover a substantial portion of its additional railroad retirement costs. Unfortunately, the imposition of increases by way of surcharges accruing to the benefit of LIRR is not, at present, available as a means of recouping its other expenses and costs and its freight service continues to be deficit ridden. Until such time as the Commission prescribes a new rate structure and/or divisional structure which will avoid the uneven effects noted in Ex Parte 271 (Sub. No. 3) and Ex Parte 299, the LIRR cannot look to its rate structure or tariffs to meet the costs of maintaining private siding switch connections since the present rate and divisional structures will merely siphon such funds off to other carriers as a form of "windfall."

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4. See footnote 3, supra.

EXCEPTIONS OF RESPONDENT, THE LONG ISLAND RAIL ROAD CO., TO THE INITIAL DECISION OF INTERSTATE COMMERCE COMMISSION

D. The Use of The Rate Base and Tariffs to Recover Private Siding Expense is Improperly Preferential of Large Shippers

As was pointed out above, Rail rates, in general, are published from and to stations regardless of whether delivery is to be effected on a public delivery track or a private siding. If the cost of maintaining a private siding switch connection is to be included in the rate base and recovered through the freight rates, this means that the smaller shippers and receivers of freight who normally use public team track facilities will assume a portion of the cost and, thus, subsidize the operations of those larger corporations fortunate and wealthy enough to enjoy private sidings.

The unrefuted evidence of record shows that in the case of GM's private siding at Bethpage, the operational cost to the LIRR is substantially higher than that of serving the closely adjacent public team track facilities, and GM admits the substantial benefit to it of receiving this preferential service. Thus, it is contrary to all principles of equity and law to impose upon LIRR a system that would require smaller shippers to additionally subsidize a corporate giant such as GM by assuming through the freight rates a portion of the cost of operating GM's private siding and switch connection. GM should bear directly the full cost of its preferential and beneficial service.

E. The Deficits of LIRR Should Have Been Taken Into Consideration

The Administrative Law Judge, in refusing to take into account the tremendous deficits sustained by LIRR since 1966, clearly is in error. In

authorizing the Commission to investigate and determine "...the reasonable compensation..." for a private siding switch connection, as well as whether or not the siding "...will furnish sufficient business to justify the construction and maintenance of same...", the Congress intended that the Commission should look into all of the relevant facts. While in some instances the profitable condition of a carrier might justify little or no compensation for the maintenance and operation of the switch connection, obviously the unprofitable condition of a deficit ridden railroad would justify as "...reasonable compensation..." the full cost of operating and maintaining a private siding switch connection.

The fallacy of regulatory policies which seek to bind all carriers into a rigid vise of equality has been amply exposed by the rash of bankruptcies affecting the railroads of the northeast. Obviously, conditions in this area are sufficiently different from the other regions so as to not only justify, but require individual treatment. In the case of the northeastern railroads, the mask of uniform regulatory policy has gone beyond mere reduction of service to mediocrity, but has produced financial disaster for practically all of the carriers in the region.

The financial problems of the LIRR cannot be disposed of by saying the statute does not provide sufficient flexibility to allow the Commission to take such matters into account. The statute, when fairly considered and interpreted, does provide ample scope for such flexibility, and it would be grievous and prejudicial error for the Commission to refuse to take the LIRR's deficits into account.

EXCEPTIONS OF RESPONDENT, THE LONG ISLAND RAIL ROAD CO., TO THE INITIAL DECISION OF INTERSTATE COMMERCE COMMISSION

**Exception 3. The Administrative Law Judge Erred In Holding That LIRR Could Not Lawfully Stop Serving The GM Private Siding**

The refusal of GM to enter into the LIRR's standard sidetrack agreement containing reasonable terms for the provision of service over the switch connection and private siding is ample justification for LIRR to refuse to continue to serve the siding. It has been a long established principle and holding of the Commission that a railroad need not serve or operate on a private siding in the absence of a reasonable agreement.

See: Imperial Wheel Co. v. St. L. IM & S Ry.
20 ICC 56 (1910)

Merchantile Trust Co. v. C.S. & H. Ry.
90 Fed. 148 (Cir Ct, Ohio - 1898)

As was shown above, it was not unreasonable for LIRR to require compensation for the maintenance of the switch connection, and the refusal of GM to sign LIRR's standard agreement is ample justification to place the switch and siding out of service.

## REQUESTED FINDINGS OF FACT AND LAW

In lieu of the findings of fact and law made in error by the Administrative Law Judge in his Initial Decision, it is respectfully requested that the Commission make the following findings of fact and law:

1. Section 1(9), by limiting the Commission's jurisdiction to the ordering of, inter alia, a private siding switch connection and determining the reasonable compensation therefor, authorizes a railroad to require an industry to reimburse it for the cost of maintaining such switch connection.

EXCEPTIONS OF RESPONDENT, THE LONG ISLAND RAIL ROAD CO., TO THE INITIAL DECISION OF INTERSTATE COMMERCE COMMISSION

2. The proposed private siding agreement tendered by LIRR to GM does not seek to levy any charge other than the actual cost of maintaining said private siding switch connection at Bethpage and, therefore, it is a reasonable condition in the said proposed agreement.

3. The LIRR does not receive compensation through its tariff rates for the maintenance of the GM private siding switch connection and, therefore, GM will not be paying twice for the same expense by entering into the proposed standard siding agreement.

4. In the absence of or upon the refusal of GM to execute the standard private siding agreement, LIRR is entitled to refuse to serve the GM private siding at Bethpage.

## CONCLUSION

The Commission, in light of LIRR's Exceptions herein, should set aside and modify the Initial Decision of Administrative Law Judge Richard S. Ries by substituting the Findings of Fact and Law requested by LIRR and so advise the United States District Court for the Eastern District of New York.

Respectfully submitted,

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Of Counsel

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

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IN THE MATTER OF

DOCKET NO. 35790

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JOINT PETITION FOR DECLARATORY ORDER --
PRIVATE SIDETRACK -- GENERAL MOTORS CORPORATION
AND THE LONG ISLAND RAIL ROAD COMPANY

---

REPLY OF PETITIONER GENERAL MOTORS
CORPORATION TO EXCEPTIONS OF RESPONDENT
THE LONG ISLAND RAIL ROAD COMPANY

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COMES NOW General Motors Corporation, by its attorneys, Benson T. Buck and Leonard F. Charla, Frazer F. Hilder, of Counsel, and files this, its Reply to the Exceptions of Respondent, the Long Island Rail Road Company, to the Initial Decision of Administrative Law Judge Richard S. Ries.

## Preliminary Statement

Pursuant to an Order of the United States District Court for the Eastern District of New York, in Civil Action No. 72 C 1549, dated December 7, 1972,

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

General Motors Corporation, (hereinafter sometimes referred to as "General Motors" or "GM") and the Long Island Rail Road Company, (hereinafter sometimes referred to as "Long Island" or "LIRR") filed a joint petition dated March 5, 1973, seeking a declaratory order from this Commission under Section 554(e) of the Administrative Procedure Act to resolve a controversy concerning various issues within the primary jurisdiction of the Interstate Commerce Commission.

The issues raised by the joint petition relate to matters arising under Sections 1 and 6 of the Interstate Commerce Act, particularly Section 1(9).

By order dated June 29, 1973, the Commission directed that this matter be handled under the modified procedure. The National Industrial Traffic League (hereinafter sometimes referred to as "NIT League") intervened in support of General Motors. Opening statements of fact and argument were filed by all parties. The several statements included Verified Statements of witnesses and exhibits. General Motors filed a rebuttal statement dated September 25, 1973. NIT League was permitted to late file its reply statement, and did so on September 27, 1973.

By order dated April 1, 1974, the proceeding was referred to Administrative Law Judge Richard S. Ries for an

Initial Decision which he rendered under date of May 6, 1974, and which was served under date of May 21, 1974. At the request of Respondent LIRR, the time to file exceptions to the Initial Decision of the Administrative Law Judge was extended to July 22, 1974. Exceptions of Respondent LIRR were filed under date of July 22, 1974.

## Reply to Exceptions

Petitioner General Motors maintains that the findings and the Initial Decision of Administrative Law Judge Richard S. Ries, dated May 6, 1974, were correct and proper in all respects. With respect to the particular allegations of Respondent LIRR, General Motors states:

1. The Administrative Law Judge ruled properly and correctly that the LIRR may not lawfully require GM to bear the expense of maintaining a switch connection including side trackage located entirely upon the right-of-way of LIRR.

2. The Administrative Law Judge found and held correctly that charges for the maintenance of a switch connection including side trackage located upon the right-of-way of LIRR are included in the tariffs and are a part of the rate base of the LIRR.

3. The Administrative Law Judge held correctly that as a matter of law that LIRR could not lawfully stop serving the GM siding where GM refuses to execute a sidetrack agreement obligating GM to bear the expense of maintenance of the sidetrack and switch connection.

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

## ARGUMENT IN SUPPORT OF REPLIES

### Reply to Exception 1

The Administrative Law Judge ruled properly and correctly that the LIRR may not lawfully require GM to bear the expense of maintaining a switch connection including side trackage located entirely upon the right-of-way of LIRR.

In its first exception to the Initial Decision of the Administrative Law Judge, the LIRR alleges that the Judge erred as a matter of law in holding that the Long Island cannot lawfully require General Motors to bear the expense of maintaining a switch connection including side trackage located entirely upon the right-of-way of LIRR. However, it is the position of Respondent LIRR, and not that of the Administrative Law Judge, which is in error.

The Administrative Law Judge did exactly as called for under the statute. After the LIRR threatened to cease operations over the switch connection as aforesaid, and upon direction of the U.S. District Court for the Eastern District of New York, GM and the LIRR filed a joint complaint with the Commission, invoking its jurisdiction under §554(e) of the Administrative Procedure Act (5 U.S.C. §554(e).) Upon due investigation, the Administrative Law Judge made the required determinations. No justification for compensation was found to exist, and the Administrative Law Judge held correctly that the LIRR could not lawfully require GM to bear the maintenance costs at issue in this proceeding.

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

The applicable statutory law governing the obligation of common carriers by rail in regard to construction and maintenance of private siding switch connections is Section 1(9) of the Interstate Commerce Act (49 U.S.C. §1(9)). (Hereinafter referred to as Section 1(9).) Section 1(9) reads in part as follows:

> "(9)Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part,

> directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

1A. The Initial Decision of the Administrative Law Judge is in Full Accord with the Plain Language of Section 1(9)

Section A of exception 1 of the LIRR states that a reading of Section 1(9) contemplates that under certain circumstances a railroad may properly and lawfully require a shipper to bear the expense of maintaining a private siding.

However, a clear reading of the language quoted, in context, shows that the thrust of Section 1(9) is precisely as the Administrative Law Judge interpreted it: The statute requires service over private sidings, when sufficient traffic exists to justify installation of the switch connection.

Briefly summarized, Section 1(9) may be divided into two sections. The first portion sets forth the duty of a common carrier by rail, relative to the construction of switch connections, and the second part authorizes the Commission to require the installation of switch connections, if the carrier has refused to or failed to install a switch connection.

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

The LIRR, by quoting certain phrases contained in Section 1(9) out of context, has concluded wrongly that under certain circumstances the Commission may determine reasonable compensation for construction and maintenance of a switch connection. Conveniently overlooked by the LIRR are two very obvious points: first, the phrase "under certain circumstances" does not mean "always;" secondly, that the charges it seeks to impose are unreasonable by their very nature.

Respondent then quotes the language of U.S. v. Standard Brewery, 251 U.S. 210 at 217 (1919), to the effect that in the construction of a law, its meaning must first be sought in the plain language employed, and courts have a duty to enforce the law as written. Respondent contends that the Administrative Law Judge viewed the phrases "reasonable terms" and "reasonable compensation" contained in Section 1(9) as "superfluous and without significance or meaning", and thus committed a prejudicial error of law. This contention of Respondent is contrary to fact.

A reading of the Initial Decision of the Administrative Law Judge discloses that he did consider and discuss the Long Island Rail Road's claim to compensation

carefully and at length, beginning on Sheet 6 of the Initial Decision. On Sheet 8, Judge Ries, after careful consideration of the Commission's decision in Merchants Refrigerating Co. v. N.Y.C. R. Co., 238 I.C.C. 599 (1940), stated:

> Here, no part of the disputed trackage is sidetrack for which rental would be appropriate and no extraordinary expenses were incurred in its construction. Charges for maintenance of these carrier facilities, which are a necessary part of the transportation service, are included in the tariffs of the carrier and are a part of the rate base of the Long Island Rail Road.

Thus, the Administrative Law Judge has treated extensively the contention of the LIRR that it is entitled to compensation under the "reasonable compensation" phrase of Section 1(9) and has concluded properly and correctly that no compensation is necessary.

Moreover, the position LIRR takes in relying on dicta from the Standard Brewery case, cited supra, is internally inconsistent since in subsequent arguments, notably in its Exception 2E, Respondent argues in effect that the plain language of the statute should not be controlling, since it, the Long Island, is in difficult financial straits. General Motors submits that the language quoted from Standard Brewery is sound, and that the position of General Motors is in full accord with the plain language of section 1(9).

**1B. The Initial Decision of the Administrative Law Judge is Entirely Consistent With Prior Decisions of the Commission Including That of the Merchants Refrigerating Case**

In seeking to establish the point that the Administrative Law Judge's ruling is inconsistent with prior Commission decisions, Respondent once more attempts to rely upon the Commission decision in the case of Merchants Refrigerating Co. v. N.Y.C. R. Co., cited supra. A thorough reading of that case, however, reveals that it supports the position of Petitioner quite solidly, and that the section upon which Respondent relies is distinguishable easily on its facts. In Merchants, the carrier constructed an elevated spur, which was considered to be part of industry's siding. Both carrier and shipper agreed on a rental for the elevated sidetrack which crossed municipal property lying between industry's facility and carrier's main line. The Commission held that the rental of the sidetrack was not a charge published in the carrier's tariff. Rent on a carrier-owned sidetrack may not be a tariff charge, but, here, the LIRR seeks to impose a charge for maintenance of ordinary track which composes a switch connection and which lies wholly upon the carrier's main line right-of-way. In the Merchants case, the

Commission stated that it was customary for the railroad to install and maintain the switch connection, (238 I.C.C. 599, at p. 601):

> "It is customary, in connection with arrangements for private sidings, for defendant to bear only the cost of building and maintaining the track between the switch point at the junction with the main line and the point where the siding clears the main line."

The Administrative Law Judge gave ample consideration to these distinctions, and explained them clearly (Sheet 7, Initial Decision):

> A reading of the Merchants case, discloses it to be distinguishable from the instant proceeding. In the Merchants case, the rail carrier was required to construct an elevated spur leading to, and treated as part of, the industry's siding. In order to recover its investment, which was considerable, the rail carrier and the shipper agreed on a rental charge for the sidetrack crossing municipal property which lay between the industry's facility and carrier's main line. The railroad was the only party that could obtain a franchise from the City of New York to run a railroad across a public street ...

Judge Ries went on to say (Sheet 8, Initial Decision):

> Here, no part of the disputed trackage is sidetrack for which rental would be appropriate and no extraordinary expenses were incurred in its construction.

The present case may also be clearly distinguished from Ziegler Brothers v. Southern Railway Company, 157 I.C.C. 660 (1929), in which the Commission declined to determine the lawfulness of charges collected for installation of a switch connection. In the instant case, the switch connection has long since been installed, and the only issue is the right of the carrier to impose a charge--any charge--for routine maintenance work performed on track lying wholly upon the Long Island right-of-way and belonging to the railroad; not to a third party, as in Merchants, nor to the shipper, as in the Ziegler case.

The Commission has long recognized the industry-wide practice of a railroad maintaining a switch connection when the connection is located entirely on railroad property. Since passage of Section 1(9) in the early part of this century (34 Stat. 584, (1906)), the Commission and the courts have often stated the view that construction and maintenance of a switch connection located upon the right of the way of a carrier is an act to be done at the expense of the carrier. That the shipper has met its burden of providing the carrier with sufficient business at its Bethpage location is beyond dispute.

Controlling in this regard is Cleveland C.C. & St. Louis Ry. Co. v. United States, 275 U.S. 404 (1928), affirming J. K. Derling Coal Co. v. Cleveland C.C. & St. Louis Ry. Co., 96 I.C.C. 143 (1925) and 109 I.C.C. 55 (1926). There, shipper had extended his private sidetrack to carrier's right-of-way and the Commission found that the carrier should construct and maintain a switch connection. See also Union Carbide Corp. v. N. & W. Ry. Co., 323 I.C.C. 65 (1964), for a thorough discussion of the matter.

Jurisdiction in this cause has been conferred on the Commission under the provisions of the Administrative Procedure Act, 5 U.S.C. §554(e), which provides:

> "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

Here, there has been a continuing controversy between Petitioner and Respondent over the question of whether the LIRR may charge GM for maintenance of the switch connection lying on LIRR right-of-way. The matter was referred to the Commission by a U.S. District Court and the Commission is duly authorized to provide its views on the matter.

Thus, in taking jurisdiction, the Administrative Law Judge acted properly and correctly in finding that the

Commission possessed the authority under the Administrative Procedure Act to determine the questions at issue and that Respondent could not lawfully require Petitioner to bear the cost of maintaining the switch connection, and that Respondent could not lawfully stop service to Petitioner over the switch connection.

## Reply to Exception 2

> The Administrative Law Judge found and held correctly that charges for maintenance of a switch connection including side trackage located upon the right-of-way of a carrier are included in the tariffs and are part of the rate base of LIRR.

The Administrative Law Judge found correctly for Petitioner on all points and clearly interpreted Section 1(9) and prior case law. The Administrative Law Judge made no errors or misinterpretations of facts or law regarding the maintenance charges or tariff rate bases of LIRR, and he properly refused to consider the financial condition of LIRR, it being wholly irrelevant in every respect.

### 2A. The Operation and Maintenance of a Private Siding Switch Connection is a Necessary and Essential Part of the Transportation Service

As surely as railroad transportation in interstate commerce is regulated by the Interstate Commerce Act, operation and maintenance of private siding switch connections is a

necessary and essential part of that transportation service, since it is required by the first portion of Section 1(9).

Once a switch connection is established between the railroad and a private industrial sidetrack of an industry, the carrier holds itself out to perform the service as Respondent has done by participating in published line-haul rates. So long as the industry has tendered sufficient business to justify the connection, the industry has an implied right to service at such switch, and may lawfully expect that the carrier shall there deliver such freight as it customarily transports for which the switch is suitable and convenient. Interstate Stock-Yards Co. v. Indianapolis Union Ry. Co., 99 Fed 472 (1900); Hines v. Henaghan, 265 Fed 831 (1920). The Supreme Court of the United States has summarized a railroad's obligation in this regard as follows:

> "The general rule is that it is the responsibility of the carrier, as part of the transportation service caused by the line-haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee... in the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding." Sec'y. of Agriculture v. United States, 347 U.S. 645 (1953) at 647.

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Once the service over a switch connection is established by the railroad pursuant to the requirements of the Interstate Commerce Act, such service may not summarily and arbitrarily be canceled and discontinued as threatened by the LIRR as long as the LIRR continues to publish rates for the transportation of this freight and Petitioner continues to tender sufficient business to justify the existence of the switch connection. This is implicit in the requirements of Section 1 et seq. of the Interstate Commerce Act requiring establishment of rates and services.

Neither the existence nor the location of team tracks along the lines of the LIRR are relevant to this proceeding. Nor can the contention that the private siding service is preferential to GM long stand, since the LIRR has over 200 other shippers with private sidings, and the statute makes available private siding service to any shipper with sufficient business to justify installation of the switch connection.

2B. The Maintenance Charges Are Included In the Rate Base of the LIRR and Are a Factor in Its Tariffs, Regardless of LIRR Management Decisions to Concur in or "Flag Out" of Recent Rate Proceedings Before the I.C.C.

The Administrative Law Judge found correctly that the maintenance charges against switch connections are included in the rate base of the carriers. This finding of the Administrative Law Judge has a solid basis in fact and is amply demonstrated by a reading of the statute, and supported by the Verified Statement of Mr. S. M. Carnahan (Attached to GM's Opening Statement of Facts and Argument and identified as Appendix C.)

Section 6(1) of the Interstate Commerce Act provides in pertinent part as follows:

> 6(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and points on the route of any other carrier by railroad . . .

The Administrative Law Judge found, on this point, that:

> Petitioner's belief that to accede to Respondent's demand would constitute a violation of Section 6 of the act is well taken. Section 6 requires all rates and fares to be filed with the Commission and obligates the carrier to keep open to public inspection schedules showing its rates and fares. Strict

> adherence to the published rates is required. All deviations, in the form of rebates or otherwise, are forbidden . . .The published rate is the only legal rate. (Sheet 8, Initial Decision.)

As Mr. Carnahan's Verified Statement indicates, charges for the costs of maintaining track lying upon the railroad right-of-way is a cost which has already been included in the rate base of the LIRR. The railroad is reimbursed out of the applicable transportation charges. Accordingly, any additional assessment as demanded by Respondent would constitute an unlawful overcharge if paid directly by Petitioner, and the Administrative Law Judge so found.

The LIRR attempts to say that it should be accorded different treatment under the Uniform System of Accounts, due to its present financial condition. However, the Uniform System of Accounts requires railroads to charge into their accounts maintenance charges for switch connections. These charges duly become part of the carriers' rate base.

Section 20(3) of the Interstate Commerce Act provides, in pertinent part, that:

> 20(3) The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this part, prescribe a uniform system of accounts applicable <u>to any class of carriers subject thereto</u>, and a period of time within which such class shall have such uniform system of accourts shall be kept. (49 U.S.C. 20(3) (Emphasis supplied.)

That the subject changes are part of the LIRR rate base is no less true merely because at one time the LIRR may have received, properly or improperly, revenue for maintenance of switch connections from some shippers.

Both General Motors and the NIT League introduced evidence which the LIRR did not attempt to dispute, showing that the LIRR was the only railroad which attempted to charge for maintenance of track owned by the railroad and located entirely upon the railroad right-of-way. (See Verified Statement of John Tobin, attached to GM's Opening Statement of Facts and Argument and identified as Appendix B, and Verified Statement of Mr. J. E. Phelan, attached to the Reply Statement of the NIT League.)

It matters not one whit, for the purposes of this case, whether or not the LIRR has been included or excluded from recent Ex parte increases, nor is it of importance when, or for what reason, the policy on switch connection maintenance used by the LIRR was adopted. What is relevant here is that the rate base of the carriers includes charges for maintenance of way; that these charges are included in the rates as published; and that any effort to recover additional charges for these expenses is improper and unreasonable. The findings of the Law Judge have a solid

basis in sections 6(1) and 20(3) of the Interstate Commerce Act, and receive ample support in the Verified Statements attached to GM's Opening Statement.

Consequently, regardless of how the LIRR would prefer to treat these charges, they are included in the LIRR's rate base under the Uniform System of Accounts and as such, as Judge Ries found, they are recovered in charges collected according to the LIRR's published tariffs.

Allegations to the effect that "the deficit-ridden LIRR is required to subsidize a profitable corporate giant" (Exceptions, p. 12), are incorrect, inappropriate, irrelevant and constitute an unwarranted and unfortunate attempt on the part of the LIRR to distort the issues before this Commission.

2C. LIRR Does Recover the Private Siding Switch Costs Through Its Tariff Rates

The LIRR, in raising the question of divisions, and of uneven effects of general increases given the railroads in recent years, seeks to escape its responsibilities as a class I interstate carrier by rail. But there can be no escape from the even-handed application of the Uniform System of Accounts, and its provisions. As explained above, the statute does not provide for different treatment according to the financial condition of the carriers, nor can the Commission consider this question in determining whether or not the law should be applied. The Administrative Law Judge wisely and correctly held, in regard to this matter:

> Finally, any notion on the part of Respondent that its financial condition alters its obligations to shippers under Section 1(9) of the Act is clearly unfounded. No provision is made in the statute for different conditions to apply to those rail carriers which do not enjoy profitable operations. (Sheet 9, Initial Decision.)

It is well known, and amply demonstrated in the Verified Statement of Mr. Carnahan, that automotive parts are highly desirable traffic. Rates on automotive parts are generally considered to be highly-rated and compensatory. As a group, automotive parts is high density freight, relative to other commodities, moves in substantial volume on a regular basis between well defined points and permits good utilization of equipment by the railroads. A typical freight carload of automotive parts contains approximately 20,000 pounds of freight which moves at rates uniformly above all other traffic rates, returning to the carriers revenues considerably in excess of costs, (cf. cost studies in Mr. Carnahan's statement, Appendix C, GM Opening Statement).

In addition, the volume of traffic being received by Petitioner at its Bethpage facility is both heavy and consistent. Approximately ten to fifteen carloads of parts have been moving into this facility, week after week, for several years, providing a steady and substantial inflow of

revenues to the Long Island. (Verified Statement of Mr. Burke, Appendix A, GM Opening Statement).

Clearly then, the nature of this traffic and the revenues derived therefrom is more than substantial enough to justify the switch connection, and to pay for its maintenance.

Railroad tariffs and the accounting rules applicable to railroads have existed for scores of years. The rate base for rates published by the several carriers, including the Respondent, have long included factors for maintenance of carrier-owned track and right-of-way. (Appendix C, GM Opening Statement). The Commission has long recognized that:

> "The conduct of the business of a common carrier by rail embraces, among other things, the maintenance of its right-of-way." Valley & Siletz R.R. Co., v. S. P. Co., 53 I.C.C. 397 (1918), at 399.

The Commission has also recognized that maintenance costs are general costs:

> "A road is built as a complete unit. The cost of maintenance of any particular portion of a line of railroad is charged against no specific traffic with respect to point of origin or destination but is represented in the general costs of moving all traffic." Klamath County Chamber of Commerce v. S.P. Co., 74 I.C.C. 207 (1922),

## 2D. The Use of the Rate Base and Tariffs To Recover Private Siding Expense Is Not A Preferential Practice

The Long Island seeks once more to attack the concept of private sidings by stating that if the cost of maintaining a private siding switch connection is to be included in the rate base and recovered through the carrier's freight rates, this means that the smaller shippers and receivers of freight who normally use public team track facilities will assume a portion of the cost. What the LIRR chooses to ignore is that the cost of maintaining team tracks is also included in the rate base. Furthermore, the revenues generated by shippers who tender or receive traffic on private sidings compensate the railroads for the costs of maintaining those switch connections.

The law is clear: The Long Island must provide service over a private switch connection if there is sufficient traffic. No amount of verbal maneuvering can change that incontrovertible fact.

## 2E. The Deficits of the LIRR Are Not A Proper Subject In This Proceeding

In seeking treatment which requires an interpretation of Section 1(9) quite different than that afforded by the plain

language of the statute, the Long Island is at odds with the principle contained in the Standard Brewery decision, cited supra, which the LIRR seeks to use in its own support in its first Exception. (Respondent's Exceptions, p. 5). The language is most appropriate when discussing Respondent's Exception 2E.

> "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it." U.S. v. Standard Brewery, 251 U.S. 210, at 217.

In its Exceptions, the LIRR is first heard to cite Standard Brewery in vigorous support of a plain language reading of Section 1(9) (which the Administrative Law Judge did in fact render), and then, in its Exception 2E, the LIRR is heard to decry "regulatory policies which seek to bind all carriers into a rigid vise of equality ..." (Exceptions, p. 15).

Resolution of the inconsistency is readily apparent: Administrative Law Judge Ries gave Section 1(9) a plain language reading and arrived at a proper and correct decision; the Interstate Commerce Act can not now be interpreted so as to provide different and special relief for a carrier which alleges financial hardship. If the Long Island believes it is deserving of treatment not presently afforded by a plain language

reading of Section 1(9), or other sections of the Act, its proper forum would appear to be the legislature.

The Administrative Law Judge held properly and correctly that the Long Island's deficits were of no importance. (Sheet 9, Initial Decision). The statute makes no provisions for rich carriers as opposed to poor carriers, or badly managed carriers as opposed to well managed carriers, or large carriers as opposed to small carriers. The point is as weighty as it is succinct: all carriers are equal under the terms of Section 1(9).

Reply to Exception 3 -- The Administrative Law Judge Held Correctly That LIRR Could Not Lawfully Stop Serving The GM Private Siding

The failure of GM and LIRR to agree upon a sidetrack agreement is not justification for the suspension of service. In relying upon two cases to establish that a railroad need not serve a private siding in the absence of a reasonable agreement, the LIRR cites one case which has been superseded by the enactment of Section 1(9), and which is of no force and effect, and another which is clearly distinguishable, and which, insofar as switch connections are concerned, actually supports the position of Petitioner.

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

The case of Mercantile Trust Co. v. Columbus S. & H. R. Co., 90 F. 148 (1898) (Circuit C., S.D. Ohio, E.D) supports the position of Respondent. Respondent neglects to mention, however, that the decision in Mercantile was rendered in 1898, and that the provision which is now Section 1(9) was not enacted until 1906. It is clear that Section 1(9) of the Act supersedes the holding in Mercantile Trust Co., and that the decision in that case is not controlling.

The second case on which Respondent relies to support its position is Imperial Wheel Co. v. St. L., I. M. & S. Ry. Co., 20 I.C.C. 56 (1910). Imperial Wheel is distinguishable in that it dealt with proposed service over a sidetrack, rather than existing service over a switch connection. A thorough reading of the case shows that it clearly supports the position of Petitioner, and not that of LIRR. Furthermore, the case was decided upon a question of safety, and no such question exists in the present action. In Imperial Wheel, the carrier refused to operate over a sidetrack until industry agreed to indemnify carrier for liability resulting from fire. The Commission, in Imperial Wheel said:

> Under Section 1, if the connection desired "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and the maintenance of the same," the requirements of the Act are

> apparently met, so far as the shipper's right to demand a connection is concerned. But the operation of a private sidetrack by a carrier is a different matter from the operation by it of the connection. If the prerequisite statutory conditions exist the connection must be made whether desired by the carrier or not. 20 I.C.C. 56, at 59. (Emphasis supplied.)

REQUESTED FINDINGS OF FACT AND LAW

It is respectfully requested that the Commission affirm the Initial Decision of the Administrative Law Judge, in all respects, the Administrative Law Judge having found correctly on all points.

CONCLUSION

The Administrative Law Judge was correct in his ruling that the LIRR may not lawfully require GM to bear the expense of maintaining a switch connection including side trackage located wholly upon the right-of-way of the carrier, and the Judge's decision on this point is in full accord with the plain language of Section 1(9). Prior Commission cases are in accord, including the holding in the Merchants Refrigerating case.

Charges which the LIRR seeks to impose are part of the rate base of the carrier and are presently being recovered in charges collected under the published tariffs of the carrier, and the Administrative Law Judge so found.

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

Maintenance and operation of a switch connection to a private siding is a necessary and essential part of interstate rail transportation service, so long as the shipper tends a sufficient volume of traffic. Management decisions of the LIRR vis-a-vis participation or nonparticipation in recent railroad rate increases have no bearing on the matter at issue. The private siding service provided for GM is not discriminatory since GM meets all statutory prerequisites for such service and the LIRR has over 200 other shippers who are served by private sidings.

The Administrative Law Judge held correctly that the financial condition of the Long Island does not alter its obligations to shippers under the terms of Section 1(9). The use of rate base and tariffs to recover private siding expense is not a practice which is preferential to any shipper. The deficits of the Long Island are not a proper subject in this proceeding, and attempts to distinguish between the LIRR and other carriers on the basis of financial condition are neither proper nor lawful. Cases relied upon the Long Island to support its position that a carrier may cease service over a switch connection are either of no force and effect, having been superseded by enactment of Section 1(9), or are distinguishable on their facts.

REPLY OF PETITIONER, GENERAL MOTORS CORP., TO EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

The Commission has been requested to affirm in full the Initial Decision of the Administrative Law Judge.

Respectfully submitted,

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REPLY OF NATIONAL INDUSTRIAL TRAFFIC LEAGUE TO THE EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

---

Docket No. 35790

JOINT PETITION FOR DECLARATORY ORDER -
PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION
AND THE LONG ISLAND RAILROAD COMPANY

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Reply To Exceptions Of The
National Industrial Traffic League

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Comes now The National Industrial Traffic League, an intervenor in this proceeding, and respectfully submits this Reply to Exceptions of the respondent, The Long Island R. Co., to the Initial Decision of Administrative Law Judge Richard S. Ries served May 21, 1974.

A Railroad May Not Require
A Shipper To Bear The Expense
Of Maintaining A Switch
Connection (Reply To Exception I)

As framed by the order of referral from the United States District Court for the Eastern District of New York,__/ the issue in this proceeding is whether Section 1(9) of

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__/ General Motors Corp. v. Long Island R. Co. Civil Action No. 72-C-1549.

the Interstate Commerce Act permits the Long Island R. Co. to refuse to serve a shipper (General Motors) over a switch connection to GM's private sidetrack unless GM agrees to bear the expense of maintaining the connection. The Administrative Law Judge has held that the shipper may not be required to bear this expense. (Initial Decision, Sheet 9) The League submits that this holding is in conformity with long-standing interpretations of the meaning of Section 1(9), and is not in error, as contended by the respondent.

Section 1(9) of the Act was added by the Hepburn Act of 1906, 34 Stat. 584 and was slightly amended by the Mann-Elkins Act of 1910, 36 Stat. 544. Since that time the courts and the Commission have continuously expressed their view that, assuming all other statutory conditions are satisfied, the construction and maintenance of a switch connection (to a private sidetrack) located wholly on a railroad's right-of-way is to be done at its expense.

Such a construction of the statute is consistent with its language. One of the statutory conditions requires the Commission to find that the switch connection will furnish sufficient business to justify its construction and maintenance. Clearly, the import of this requirement is that the railroad will receive sufficient line haul revenues from the traffic moving via the connection to compensate

it for the cost of constructing and maintaining it. In this case, the LIRR obviously must have made such a determination, as it has constructed and operated the switch connection for several years, and has handled substantial quantities of traffic.

A prime example of the interpretation place on the statute is found in Cleveland, C. C. & St. L. Ry. Co. v. United States, 275 U.S. 404 (1928), affirming J. K. Dering Coal Co. v. Cleveland, C. C. & St. L. Ry. Co., 96 I.C.C. 143 (1925) and 109 I.C.C. 55 (1926). In that case, the shipper had constructed his private sidetrack up to the right-of-way of the railroad. The Commission found, inter alia, that the switch connection should be constructed and maintained by the railroad. See 96 I.C.C. at 153 and 275 U.S. at 406. See also Sioux City Term. Ry. Switching, 241 I.C.C. 53, 70 (1940).

Likewise, in Merchants Refrigerating Co. v. New York Central R. Co., 238 I.C.C. 599 (1940), the Commission said, at page 601:

> "It is customary, in connection with arrangements for private sidings, for defendant to bear only the cost of building and maintaining the track between the switch point at the junction with the main line and the point where the siding clears the main line."

In this case, the LIRR wishes GMC to assume the cost of maintaining the switch connection up to and including the point of switch, all on the railroad's right-of-way.

More recently, in Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (1964), the Commission, in entering an order requiring the defendant railroad to construct and maintain a switch connection, found, at page 73, that:

> "The entire cost of this connection estimated at $5,300 and which will be located entirely on defendant's property, will be borne by defendant. Complainant will complete the private sidetrack and bear the cost and maintenance of such track which is located on its property. Construction and maintenance of this connection is justified."

These findings by the Commission that a railroad should bear the cost of construction and maintenance of a switch connection, are not discretionary policy choices, but are a reflection of the genral duty imposed upon all common carriers by railroad to provide and furnish transportation upon reasonable request. See Section 1(4), 49 U.S.C. §1(4), and Huerfano Coal Co. v. Colorado & S.E.R. Co., 28 I.C.C. 502, 505 (1913). Cf, Schlicher v. Director General, 62 I.C.C. 181, 187 (1921). This duty requires the LIRR to furnish at its expense the facilities necessary to discharge its obligations as a common carrier.

REPLY OF NATIONAL INDUSTRIAL TRAFFIC LEAGUE TO THE EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

## The Long Island Receives Compensation For Its Expenses Of Maintaining The Switch Connection (Reply To Exception 2)

The Initial Decision found, at Sheet 8, that the Long Island was compensated for the expenses of maintaining the switch connection on its right-of-way. This finding, contrary to respondent's assertion at page 9 of its Exceptions, is fully supported in the record (See Initial Decision, Sheet 5-6).

Long Island has not controverted GM's specific evidence that the rates applicable to the traffic moving over the switch connection are more than conpensatory. It should be fully compensated for the provision of such facilities by the revenues received from the traffic transported over them. It should not, by coercion, compel GMC to reimburse it for the maintenance of the switch connection above and beyond the revenues received for the traffic moving over the switch connection.

Instead, respondent has chosen to rely on very general arguments about its alleged freight service deficit and how the Judge should have considered it in reaching his decision. This argument is specious in the extreme. The existence of alleged deficits has no bearing on the duty of the Long Island to discharge its obligations to the public as a common

carrier. The duties imposed include provision of railroad service to a private siding served by a switch connection, as recognized in Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954).

It is nothing short of mind-boggling to find the Long Island proudly proclaiming the success of its efforts to "flag-out" of all the recent railroad general increases, while arguing that its alleged deficits make it necessary to require its shippers to pay for the maintenance of switch connections on its right-of-way. No error in the Judge's finding has been shown in this respect.

In view of the inadequacies in Long Island's arguments in support of its first two exceptions, it is apparent that there would be no basis of support for its third exception.

## Conclusion

For all of the foregoing reasons, the Commission should find that the Initial Decision is proper and correct in all respects, including those matters of fact and law excepted to by the respondent. Furthermore, it should find that General Motors Corporation is not required to bear the expense of maintenance of a switch connection for its private sidetrack, said switch connection being located entirely the right-of-way of the Long Island Railroad Co.

REPLY OF NATIONAL INDUSTRIAL TRAFFIC LEAGUE TO THE EXCEPTIONS OF THE LONG ISLAND RAIL ROAD COMPANY

Dated at Washington, D. C. this 12th day of August, 1974.

Respectfully submitted,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE
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THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Due Date: August 12, 1974

SECOND DECISION OF THE INTERSTATE COMMERCE COMMISSION.

DECISION AND ORDER JS-3161 JUN 17 1975

At a Session of the Interstate Commerce Commission, Division 3, held, at its office in Washington, D. C., on the 10th day of June , 1974.

RECEIVED
LAW DEPT.
JUN 18 1975
THE LONG ISLAND
RAIL ROAD COMP.

No. 35790

JOINT PETITION FOR DECLARATORY ORDER PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAILROAD COMPANY

Upon consideration of the complaint and record in the above-entitled proceeding, including the initial decision of the Administrative Law Judge, served May 21, 1974, the exceptions of respondent The Long Island Rail Road Company (Long Island) filed July 22, 1974, and of the replies thereto of petitioner General Motors Corporation (GM) and of intervener National Industrial Traffic League, both filed August 12, 1974, and;

It appearing, That the Administrative Law Judge found that the Long Island cannot lawfully require petitioner to bear the expense of maintaining a switch connection including sidetrackage located entirely on the right-of-way of Long Island and that Long Island cannot lawfully stop servicing GM's facility where GM refuses to execute a sidetrack agreement obligating it to bear the expense of maintaining Long Island's switch connection;

And it further appearing, That the exceptions do not show any material errors in the Administrative Law Judge's statement and evaluation of the facts, conclusions of law, and findings; do not raise any material matters of fact or law not adequately considered and properly disposed of in his report; and are not of such a nature as to require the issuance of a report by Review Board Number 4, discussing the evidence submitted and arguments advanced by the parties in light of the execptions;

Wherefore, and good cause appearing therefor:

We find, That the evidence, considered in the light of the exceptions, does not warrant a result different from that reached by the Administrative Law Judge and that the statement of facts, conclusions and findings of the Administrative Law Judge, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That this proceeding be, and it is hereby discontinued.

By the Commission, Division 3.

RICHARD W. KYLE
Acting Secretary

(SEAL)

SECOND DECISION OF THE INTERSTATE COMMERCE COMMISSION

No. 35790

JOINT PETITION FOR DECLARATORY ORDER PRIVATE SIDETRACK * GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAILROAD COMPANY

COMMISSIONER O'NEAL, dissenting:

The initial decision of the Administrative Law Judge, which the majority adopts, would preclude a railroad from ever initiating a separate charge for maintaining a switch connection so long as the shipper continues to furnish "sufficient business." The judge states, in part,

> It is implicit under the requirement of section 1 of the act that transportation service established thereunder may not be summarily or arbitrarily canceled and discontinued as threatened by the respondents as long as respondent continues to tender sufficient business to justify the switch connection.

Section 1(9) makes no such requirement, either explicitly or implicitly. The section states,

> 1(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish care for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The section speaks only to the situation where no switch has been installed. It does not address the situation here, where a carrier voluntarily installs a switch without charge, but later seeks to demand compensation. However, the statute indicates the proper approach in such a situation. The carrier may discontinue the switch,

and the shipper may then make application to the carrier to install one or file a complaint with this Commission to compel the carrier to do so. The parties in this proceeding have avoided this somewhat unwieldy procedure by jointly seeking a declaratory order from the Commission. However, the Commission should treat the case as involving an application and complaint on the part of the shipper. That is the posture in which the case would have appeared before the Commission had not the parties jointly consented to such a declaratory order.

The Administrative Law Judge instead interpreted the section to require the carrier to continue to operate the switch without compensation as long as the shipper furnishes "sufficient business." First, the requirement that the carrier continue to maintain a switch connection applies only in situations where the shipper has applied for the switch and where the carrier may operate it "upon reasonable terms." The "sufficient business" condition must be read in conjunction with the provision for "reasonable terms." The L.I.R.R. in this case is not operating the switch "on reasonable terms"--it is not operating it with the benefit of any terms at all. Thus, the requirement that the carrier maintain service upon a tender of sufficient business would not seem to apply in these circumstances.

Also, the Judge's interpretation in effect creates Commission jurisdiction over abandonment by carriers of switch connections. The act contains no provision giving the Commission such authority. To the contrary, section 1(9) remains completely silent on the point.

The majority's decision in this proceeding seems to create the potential for illogical treatment for carriers with switch connections leading to private sidings.

SECOND DECISION OF THE INTERSTATE COMMERCE COMMISSION

A carrier which refuses a shipper's request to install a switch and is later compelled to by the Commission upon the shipper's complaint may charge reasonable compensation for doing so. On the other hand, a carrier which voluntarily installs a switch connection for no charge but later wishes to impose a charge may not do so, so long as some unspecified volume of traffic is maintained. That appears to be a singularly anomalous result.

The Administrative Law Judge has found a duty by a rail carrier to maintain a switch connection in the Supreme Court's decision in Sec'y. of Agriculture v. United States, 347 U.S. 645 at 647:

> The general rule is that it is the responsibility of the carrier, as part of the transportation service caused by the line-haul rate, to "deliver" the goods by placing them in such a position as to make them accessible to the consignee *** in the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding.

The Court's holding does not support the judge's argument. The Court merely held that if a private siding exists, a carrier must deliver on it. It does not impose a duty to maintain the siding. That obligation, with its attendant conditions, is set out in section 1(9) of the act.

The L.I.R.R. has cited the Commission's decision in Merchants Refrigerating Co. v. N.Y. Central R.R., 238 I.C.C. 599 as precedent for its position. There, the Commission sanctioned an agreement between a carrier and a shipper for a rental charge to be paid by a private shipper for a carrier-owned sidetrack. The Commission stated there,

SECOND DECISION OF THE INTERSTATE COMMERCE COMMISSION

> Section 1(9) of the Interstate Commerce Act provides that a carrier may charge reasonable compensation for a switch connection. The spur, which is in part a switch connection, would not have been necessary but for the private sidings of complainant and the National Biscuit Company.

The Judge distinguishes Merchants on the facts: the carrier incurred extraordinary expenses in constructing the elevated spur, and only the railroad could have built the spur over a public street. However, the fact that a high construction cost was incurred does not alter the legal principle. Nor does the fact that only the railroad could have built the facility; that is true in every case.

The Judge also states,

> Charges for maintenance of these carrier facilities, which are a necessary part of the transportation service, are included in the tariffs of the carrier and are a part of the rate base of the Long Island Railroad.

The point is well taken. At present, the costs of maintaining this switch connection are being paid out of the line-haul rate. However, it is erroneous to deduce from this that once the carriers initiate this form of compensation he is wedded to it. The carrier may, under the provisions of section 1(9), institute a separate charge for the maintenance of a switch connection and adjacent spur, subject to a determination by the Commission as to the reasonableness of the charge. However, the institution of such a charge necessarily results in an increase in the line-haul rate, since a service previously provided as a part of that rate has been eliminated. The Commission recently faced a similar situation in Investigation and Suspension Docket No. 8548, Inspection in Transit, Grain and Grain Products, 349 I.C.C. 89, on remand from the Supreme Court, Atchison, T. & S.F. R. Co. v. Wichita Bd. of Trade,

SECOND DECISION OF THE INTERSTATE COMMERCE COMMISSION

412 U.S. 800. The Commission held that the rail carriers could institute a new, separate charge for in-transit inspections which had previously been performed as part of the line-haul rate. However, the institution of the separate charge resulted in a reduction in services available under the line-haul rate. As the majority noted,

> A reduction in service, whether integral or nonintegral to the basic service, must, under previous Commission decisions, be treated functionally as resulting in increased rates.

That statement reflects the Commission's view expressed in Transit Charges, Southern Territory, 332 I.C.C. 664 (1968).

The Long Island Railroad should be allowed to institute a separate maintenance charge upon either a proportionate reduction in the line-haul rate or a showing of justification for what is in effect an increase in the line-haul rate. The rate increase, in this instance, would apply only to the line-haul rates on auto parts to or from the General Motors' siding in Bethpage, New York. As to the ability of the L.I.R.R. to justify such increases, it is worth noting that it has not participated in any of the recent general rate increases, and that in the twelve month period ending March 31, 1975, the carrier lost $119,359,000.

The situation of the Long Island illustrates why the imposition of a separate maintenance charge represents not only good law but also good economics and policy. The record shows that the switch connection costs $2,908 per year to maintain and that switching cars into the General Motors' private siding is more costly and time consuming than switching to the nearest public team track. Those costs are now

apportioned among all the rates charged by the Long Island Railroad (or perhaps all the rates charged on auto parts). The shippers who do not have the benefit of private sidings must help p or those who do. The L.I.R.R. proposal constitutes an attempt to impose ges which reflect the costs of the services on which they are assessed. This approach is not only more equitable but, as the Long Island alleges, may be the only feasible way for that carrier to increase its revenue. The L.I.R.R. has stated that participation in nationwide general freight rate increases would divert traffic volume from its lines and would yield decreased revenues.

The Long Island Railroad should be allowed to establish separate charges for maintenance of switch connections and rail spurs to private sidings, and the Commission should decide the reasonableness of the proposed compensation under section 1(9) of the act. The imposition of such charges would of necessity require either a justification in the line-haul rate or a rate increase justification. The initial decision of the Administrative Law Judge, which the majority of Division 3 upholds, takes an unduly restrictive view of section 1(9) and by doing so injures the railroad respondent here and the shippers who must subsidise through their line-haul rates their more fortunate bretheren who have the benefit of private sidings.

PETITION OF THE LONG ISLAND RAIL ROAD CO., FOR RECONSIDERATION OF THE DECISION AND ORDER OF THE COMMISSION, DIVISION 3.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

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JOINT PETITION FOR DECLARATORY ORDER - PRIVATE SIDETRACK - GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAILROAD COMPANY

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Docket No. 35790

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PETITION OF RESPONDENT THE LONG ISLAND RAIL ROAD COMPANY FOR RECONSIDERATION OF THE DECISION AND ORDER OF THE COMMISSION, DIVISION 3

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The Long Island Rail Road Company (hereinafter "LIRR"), a joint petitioner and respondent herein, does hereby petition the Commission, Division 3, for reconsideration of its Decision and Order issued in the above-captioned proceeding under date of June 10, 1975, and served June 17, 1975, in the following respects and upon the following grounds.

I. The Commission, Division 3, is Improperly and Erroneously Interpreting and Applying Section 1(9) of the Interstate Commerce Act.

Even beyond violating the plain meaning of Section 1(9), the majority decision of Division 3, in affirming the Initial Decision of Administrative Law

PETITION OF THE LONG ISLAND RAIL ROAD CO., FOR RECONSIDERATION OF THE DECISION AND ORDER OF THE COMMISSION, DIVISION 3

Judge Reis flies in the face of rationality and the prior precedents of the Commission. The dissent of Commissioner O'Neal not only highlights and disects the weakness of the majority position, but in its strength and clarity epitomizes the words of Sir John Powell in Coggs v. Bernard, 2 Lord Raymond 911:

> "Let us consider the reason of the case. For nothing is law that is not reason."

The errors implicit in the majority decision as well as those made explicit in the Initial Decision of the Administrative Law Judge will require judicial reversal if the Commission, upon reconsideration, is incapable of correcting its mistakes.

A. The majority decision violates the plain meaning of Section 1(9)

The applicable statutory law governing the obligation of common carriers by rail in regard to the construction, maintenance and operation of private siding switch connections is found in Section 1(9) of the Interstate Commerce Act (49 U.S.C. §1(9) ), hereinafter referred to as the Act. Said Section 1(9) of the Act reads in pertinent part as follows:

> "Any common carrier subject to the provisions of this part, upon application of any...shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such...private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of same;....If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application in writing by any such shipper..., such shipper...may make complaint to

> the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor...." (emphasis added)

A reading of Section 1(9) makes it clear that the Statute definitely contemplates that, under certain circumstances, a railroad may properly and lawfully require a shipper to bear the expense of maintaining a private siding switch connection even though such switch connection and associated trackage are located upon the railroad's right-of-way. The language emphasized in the portion of Section 1(9) quoted above makes this obvious, otherwise why would Congress have used such language as:

> "...maintain and operate upon reasonable terms a switch connection..."
>
> "...the Commission...shall determine...the reasonable compensation therefor...."

Nowhere in the Section does the Statute distinguish between switch connections located on railroad property and switch connections located off railroad property. Further, neither the Interstate Commerce Act nor any other law authorizes the Commission to add to, subtract from or otherwise amend the statutory language.

As the United States Supreme Court has succinctly expressed it:

> "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."
> U.S. v. Standard Brewery, 251 U.S. 210, at 217 (1919).

As viewed by the Administrative Law Judge in his Initial Decision and apparently by the majority of Division 3 in their boiler plate affirmance of the Initial Decision, the words of the Statute referring to "reasonable terms" and "reasonable compensation" are superfluous and without significance or meaning.

PETITION OF THE LONG ISLAND RAIL ROAD CO., FOR RECONSIDERATION OF THE DECISION AND ORDER OF THE COMMISSION, DIVISION 3

This is prejudicial error of law and requires correction upon review.

B. The majority decision conflicts with prior decisions of the Commission

In holding as a matter of law that the LIRR could not require GM to bear the expense of maintaining the switch connection, the majority of Division 3 and the Administrative Law Judge relied upon an erroneous and faulty distinction between the instant case and the prior decision of the Commission in Merchants Refrigeration Company v. N. Y. Central RR Co., 238 ICC 599 (Div. 3-1940). The distinction relied upon by them is based upon a view of where "...extraordinary expenses were incurred in its construction" (sheet 8) as opposed to where there is a normal private sidetrack connection. In making this distinction the Initial Decision carefully quotes a portion of a paragraph on 238 ICC at 601 and ignores the opening sentence of the paragraph which flatly states:

> "Section 1(9) of the Interstate Commerce Act provides that a carrier may charge reasonable compensation for a switch connection."

There is no hedging or qualification in this sentence and it does not limit reasonable compensation to those situations where extraordinary expense is involved.

Further, the Initial Decision and the majority completely ignored the language of Division 3 at 238 ICC 604 where it stated:

> "This is an arrangement to connect defendants' line with complainants private siding and to provide for the continuance and upkeep of the spur track. It is not a contract for transportation itself or for the movement of particular shipments. The rent is payable even if no shipments are made. It

> is beyond the jurisdiction of this Commission. Ziegler Bros. v. Southern Ry. Co., 157 ICC 660. Section 6 of the Act does not require the publication of the terms upon which a switch connection is to be built and operated."

The Ziegler case cited by Division 3 in the above-quoted language involved a levy by the Southern Railway Co. of charges over a period of time to cover the costs of installing upon its right-of-way a normal switch connection for a private siding. The Commission, Division 5, in dismissing a complaint alleging the unreasonableness of such charges, said in respect to Section 1(9) of the Act at 157 ICC 662:

> "The first part of the foregoing quotation sets forth the duty of a common carrier relative to the construction of switch connections, and the latter part authorizes us to require the installation of switch connections, subject to certain conditions precedent, only when the carrier 'shall fail to install and operate any such switch or connection' and under such circumstances to determine the reasonable compensation therefor. It does not authorize us to determine what a reasonable charge would be for a switch connection that has been installed and in operation. Our jurisdiction extends only to the consideration of the installation of switch connections when carriers refuse or fail to install such connections. The instant case does not fall within this class as the defendants did not refuse or fail to install the switch connection for complainants at Rutherfordton.
>
> "No evidence was introduced in support of the allegation of undue prejudice.
>
> "We find that we do not have jurisdiction to determine the lawfulness of charges collected by defendant for installing a switch connection at Rutherfordton. Therefore the complaint will be dismissed."

Thus, in 1929, the Commission recognized the right of a railroad to charge for the installation of a normal switch connection on its right-of-way and refused to interfere with the collection of such charges. Eleven years later, in Merchants Refrigeration, the Commission specifically held that the charges or rent for the maintenance and upkeep of spur trackage owned by the railroad and part of its right-of-way was lawful and did not have to be published in a tariff.

Even though, as recognized in Merchants Refrigeration, it is customary in the industry for a railroad to bear the cost of maintaining a switch connection for a private siding, there can be no question but that it is not unlawful per se for a railroad to levy reasonable charges against the shipper to cover such maintenance expense.

## II. The Majority Interpretation of Section 1(9) Creates an Irrational Situation.

As pointed out in Commissioner O'Neal's dissent, the adoption by the majority of Division 3 of the Initial Decision creates an irrational and anomalous situation in several respects.

First, the Initial Decision has interpreted Section 1(9) as requiring a carrier to continue to operate a switch connection without compensation as long as the shipper furnishes "sufficient business." The explicit language of Section 1(9), however, only requires a carrier to operate such a switch upon "reasonable terms" where it "...will furnish sufficient business to justify the construction and maintenance of same;... ." As Commissioner O'Neal

succinctly notes, in the instant case, the LIRR is not being required to operate the switch "on reasonable terms" but rather without the benefit of any terms whatsoever and thus it hardly seems logical to apply the "sufficient business" as a requirement in these circumstances.

Second, as is also pointed out by Commissioner O'Neal, a singularly anomalous result occurs from the majority's interpretation of Section 1(9) in that a carrier which refuses a shipper's request to install a switch and is later compelled to by the Commission may charge reasonable compensation for doing so whereas a carrier which voluntarily installs a switch connection for no charge, may not later seek reasonable compensation for its maintenance as long as some unspecified volume of traffic is maintained.

Third, while the Administrative Law Judge and the majority assume that there is an increment of cost in the through rate on General Motors' traffic to Bethpage, they ignore the fact noted by Commissioner O'Neal that the LIRR has flagged out of most of the recent general freight rate increases and they ignore the Commission's own findings in Ex Parte 270 (Sub No. 3) and in Ex Parte No. 299 regarding the uneven and inequitable effects of divisional arrangements upon the recovery of costs by the carrier that incurs the costs. These last two proceedings and the action by the LIRR in Ex Parte 299 (Sub No. 1) clearly illustrate the fallacy of requiring a carrier to recoup specific expenses peculiar to the operation on its line through the medium of a percentage increase in the line haul rate. In Ex Parte No. 299 (Sub No. 1) the LIRR, in order to avoid giving windfall profits to its connecting carriers, and

thus frustrating the intent of Congress on the recoupment of its increases in Railroad Retirement Taxes, was forced to publish its own terminal surcharge with the proceeds therefrom accruing solely to the LIRR. By requiring the recoupment of expenses for the maintenance of private sidings from the line haul rate, not only is the Commission mandating that the LIRR not recoup its entire cost, but it is requiring the LIRR to give improper windfall profits to its undeserving connecting carriers who do not incur any of the switch maintenance costs.

The illogical and anomalous results that appear to flow from the Initial Decision and affirmance thereof by the majority of Division 3 bring to mind the words of Lewis Carroll from Alice's Adventures in Wonderland:

> "You are old, Father William," the young man said, "And your hair has become very white; and yet you incessantly stand on your head--Do you think, at your age, it is right?"

## CONCLUSION

As has been shown above and by the dissent of Commissioner O'Neal, the Initial Decision of Administrative Law Judge Ries and its affirmance by the majority of Division 3, is illogical, anomalous, contrary to the plain meaning of the Statute and makes bad law. In lieu of the findings of fact and law made in error by the Administrative Law Judge in his Initial Decision and affirmed by the majority of Division 3, it is respectfully requested that upon reconsideration the Commission make the following findings of fact and law:

1. Section 1(9), by limiting the Commission's jurisdiction to the ordering of, inter alia, a private siding switch connection and determining the reasonable compensation therefor, authorizes

a railroad to require an industry to reimburse it for the cost of maintaining such switch connection.

2. The proposed private siding agreement tendered by LIRR to GM does not seek to levy any charge other than the actual cost of maintaining said private siding switch connection at Bethpage and, therefore, it is a reasonable condition in the said proposed agreement.

3. The LIRR does not receive compensation through its tariff rates for the maintenance of the GM private siding switch connection and, therefore, GM will not be paying twice for the same expense by entering into the proposed standard siding agreement.

4. In the absence of or upon the refusal of GM to execute the standard private siding agreement, LIRR is entitled to refuse to serve the GM private siding at Bethpage.

Respectfully submitted,

George M. Onken

GEORGE M. ONKEN
Attorney for The Long
Island Rail Road Company
Jamaica Station
Jamaica, New York 11435

RICHARD H. STOKES
WALTER J. MYSKOWSKI
Of Counsel

FINAL DECISION OF THE INTERSTATE COMMERCE COMMISSION.

*Served March 17, 1976*

30849

INTERSTATE COMMERCE COMMISSION

RECEIVED
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No. 35790

**JOINT PETITION FOR DECLARATORY ORDER—PRIVATE SIDETRACK—GENERAL MOTORS CORPORATION AND THE LONG ISLAND RAIL ROAD COMPANY**

*Decided February 3, 1976*

Upon reconsideration, carrier's attempt to condition continued rail service at shipper's private sidetrack upon that shipper's agreement to bear the switch connection maintenance expense found unlawful. Prior decision affirmed and proceeding discontinued.

*Benson T. Buck* and *Leonard F. Charla* for petitioner.
*Walter J. Myskowski, George M. Onken,* and *Richard H. Stokes,* for respondent.
*John F. Donelan* and *Frederic L. Wood* for intervener.

REPORT AND ORDER UPON RECONSIDERATION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CORBER, ACTING AS AN APPELLATE DIVISION

BY THE DIVISION:

In the prior decision and order, decided June 10, 1975 (not printed), we affirmed the initial decision of the Administrative Law Judge, holding that the Long Island Rail Road Company (LIRR or respondent) may not lawfully precondition continued rail service to the private sidetrack of General Motors Corporation (General Motors or petitioner) upon General Motors' agreement to bear the maintenance expenses for the switch connection to that private sidetrack. We now reopen this proceeding upon our own motion in order to clarify several issues arising in connection with section 1(9) of the Interstate Commerce Act (Act).

General Motors maintains a warehousing and distribution facility at Bethpage, N.Y., receiving an average of 10 to 15 carloads of automobile and truck parts per week. The LIRR provides rail service to this facility by way of a switch connection and private sidetrack extending from the LIRR's main line. At the time the

# FINAL DECISION OF THE INTERSTATE COMMERCE COMMISSION



sidetrack was constructed, the LIRR's prevailing policy dictated that the railroad would pay for the construction of the sidetrack from the switch point to that point of the sidetrack just clear of the railroad's right-of-way, while General Motors would pay the construction cost for the remainder of the sidetrack. Similarly, since 1965, when the private sidetrack was first placed into service, the LIRR has assumed the expense of maintaing the switch connection and that portion of sidetrack located within its right-of-way, while petitioner has paid for the maintenance of the remainder of the sidetrack. In the interim since service was first initiated over the switch connection, the LIRR's financial condition has deteriorated so that, according to the railroad, the LIRR can no longer afford to absorb the switch connection maintenance expenses.

To relieve its financial dilemma, the LIRR sought to require General Motors and other private sidetrack users to bear the entire maintenance expense attributable to private sidetracks, including those expenses formerly absorbed by the railroad for switch connections located within its right-of-way. Upon General Motors' refusal to execute a sidetrack agreement obligating itself to bear the switch connection maintenance expense, respondent threatened to terminate service to General Motors' sidetrack. Thereupon, General Motors obtained a temporary restraining order in the United States District Court for the Eastern District of New York, enjoining the LIRR from halting rail service. That restraining order remains in effect, pending the Commission's resolution of the respective rights and duties attending the involved switch connection. The National Industrial Traffic League has intervened in support of General Motors.

In the initial decision, the Administrative Law Judge concluded that the involved switch connection is a part of respondent's overall transportation facility, and thus, is to be maintained from the line-haul revenues received by the railroad. He further concluded that, inasmuch as respondent's line-haul rates presently include delivery at petitioner's private sidetrack, the maintenance charge, if imposed, amounts to an increased transportation charge, not lawfully published in the carrier's tariffs. He also concluded that, as long as petitioner continues to furnish sufficient business, respondent is obligated to operate and maintain the switch connection. Upon these conclusions, the Administrative Law Judge found that

respondent could neither lawfully impose the maintenance charge upon General Motors nor lawfully terminate service to General Motors' sidetrack. As previously indicated, we adopted these conclusions and findings as our own.

Respondent defends its levy of switch connection maintenance charges upon the language of section 1(9) of the Act, which, when given its plain meaning, allegedly authorizes a carrier to impose maintenance charges upon the shipper being served by a particular switch connection. In support of its position, the LIRR emphasizes the following underscored portions of section 1(9):

> Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate *upon reasonable terms* a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install *and operate* any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and *reasonable compensation therefor*, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

The LIRR contends that this statutory language is clear and not subject to reasonable dispute insofar as it authorizes a carrier to condition service over a switch connection upon a maintenance agreement. Respondent further notes that section 1(9) draws no distinction between switch connections located within the railroad right-of-way and those located outside the railroad right-of-way.

Respondent also argues that prior Commission decisions have recognized a carrier's authority to impose switch connection maintenance charges upon a shipper and that, therefore, our affirmance of the initial decision violates Commission precedent. The LIRR cites *Merchants Refrigeration Co.* v. *New York Central R. Co.*, 238 I.C.C. 599, a 1940 decision wherein the Commission held that a railroad could recoup from a shipper the cost of constructing and maintaining an elevated spur track serving the

shipper's private facility. Respondent argues that, in the cited case, the Commission described section 1(9) as containing an unqualified grant of authority to carriers to impose maintenance agreements upon shippers served by switch connections.

The cited case also allegedly establishes maintenance charges to be in the nature of rent, as distinguished from transportation charges subject to tariff publication. This distinction between so-called rents and transportation charges is based upon the decision in *Ziegler Bros.* v. *Southern Ry. Co.*, 157 I.C.C. 660 (1929), another case cited by respondent in support of its argument. In that case, the Commission concluded that it did not have jurisdiction to review the reasonableness of a contract setting out the terms under which a switch connection and private sidetrack were constructed. Respondent urges the Commission to adopt the rationale of the *Ziegler Bros.* decision and hold that contractual obligations incident to switch connections are outside the Commission's jurisdiction.

The LIRR assails our conclusion that the railroad is obligated to maintain and operate the switch connection as long as General Motors continues to furnish sufficient business at its private sidetrack. Our adoption of the "sufficient business" criterion, which comes from the statutory language of section 1(9), is allegedly improper because that section of the Act employs the "sufficient business" criterion only in relation to switch connections which are operated under a contractual arrangement setting out "reasonable terms." Here, the railroad contends, the maintenance and operation of the switch connection is being compelled without the benefit of any terms at all.

Respondent points out that a carrier who is ordered by the Commission to install a switch connection may, pursuant to section 1(9), be entitled to compensation, if the Commission so determines. Therefore, the LIRR argues, a carrier who voluntarily installs a switch connection should similarly be entitled to compensation.

Respondent also challenges our conclusion that, under the present line-haul rates, the LIRR must deliver petitioner's traffic to its private sidetrack and therefore, the railroad must look to its line-haul revenue to recoup its switch connection maintenance expense. According to the LIRR, its transportation obligation would be satisfactorily fulfilled if General Motors' traffic were diverted to the public team tracks at Hicksville (3 miles distant) or at Farmingdale (2 miles distant). Respondent alleges that under the present

# FINAL DECISION OF THE INTERSTATE COMMERCE COMMISSION



circumstances placement of cars at the private siding is more costly than is placement at public team tracks and that, accordingly, petitioner's traffic unduly burdens other interstate commerce. Continued absorption of the maintenance expenses is allegedly unjustly discriminatory and unduly prejudicial to smaller shippers who have no private facilities. Thus, the LIRR suggests, these smaller shippers are, in effect, subsidizing the private facilities of General Motors.

Respondent further argues that the presumption that respondent's line-haul revenues are adequate to cover switch connection maintenance expenses is unfounded in light of the LIRR's nonparticipation in recent general increases. In this regard, our prior decision allegedly ignores our recent conclusions in other cases as to the uneven effects of general rate increases and the inadequacy of current railroad revenue division agreements.

Petitioner and intervener maintain that the initial decision properly construes section 1(9) and that the cases cited by respondent in support of its position are distinguishable on their facts. General Motors insists that the switch connection is a necessary and essential part of the LIRR's transportation facility which respondent is obligated to maintain from its line-haul revenues. Any imposition of maintenance charges or termination of rail service to petitioner's sidetrack would purportedly be an unlawful increase in rates and a violation of sections 1 and 6 of the Act. Petitioner denies that service to its sidetrack constitutes an unjust discrimination or undue preference and asserts that the LIRR must continue service over the switch connection as long as sufficient business at the sidetrack continues.

## DISCUSSION AND CONCLUSIONS

Among the various obligations of a common carrier by rail is the duty to establish switch connections, as set out in section 1(9) of the Act. The first sentence of that section obligates a carrier to establish a switch connection with a lateral branch line or a private sidetrack once certain specified conditions are determined to exist. The second sentence of that section prescribes a remedy for shippers or branch line owners who are unable to secure a voluntarily established switch connection. Since the switch connection involved here was voluntarily established, our concern in this proceeding is the proper interpretation of the first provision of

section 1(9), that is, the carrier's obligation to construct, maintain, and operate a switch connection.

Contrary to respondent's argument, a carrier's obligation to establish a switch connection is not to be determined by the presence or absence of a contractual arrangement setting out "reasonable terms." Rather, the plain meaning of the statute suggests that a carrier's obligation with regard to switch connections is qualified by the following three conditions: that the switch connection is reasonably practicable; that the switch connection can be installed and operated with safety; and that the switch connection will furnish sufficient business to justify its construction and maintenance.

Apparently satisfied that the necessary conditions were present, the LIRR constructed the switch connection at its own expense and similarly absorbed the maintenance expense for that connection up until the time the present controversy arose. This practice of absorbing the construction and maintenance expenses is in accord with section 1(6) of the Act, which, in part, requires rail carriers to adopt and observe just and reasonable practices for the safe and prompt delivery of freight. In light of respondent's prior absorption of maintenance of expenses, we do not believe that respondent's attempt to transfer the switch connection maintenance obligation to petitioner is consistent with the carrier's obligation to deliver petitioner's freight. The task of delivering freight is an integral of the transportation obligation, and therefore, as a general rule, the delivery of freight is a service performed under a carrier's line-haul rate. Correspondingly, the expenses attributable to delivering freight should generally be met from a carrier's line-haul revenues. See *Propriety of Operating Practices—Packing Sheds*, 246 I.C.C. 273, 283 (1941), and *Split Deliveries and Drayage Allowance at New York*, 245 I.C.C. 40, 41 (1941). In the case of the LIRR, the switch connection in question was a part of the railroad's general transportation facility, paid for and maintained from the line-haul revenues of the railroad. Under the LIRR's line-haul rates, traffic was picked up and delivered at General Motors' sidetrack, without any obligation on the part of the shipper to maintain the switch connection making that service possible. Respondent has neither alleged nor shown any adverse change in the practicability or the safety of the switch connection or in the sufficiency of business to and from General Motors' sidetrack. Therefore, in the absence of a change in one of the conditions set out in section 1(9), respondent's statutory obligation to provide switch connection service remains.

# FINAL DECISION OF THE INTERSTATE COMMERCE COMMISSION



Respondent's reliance on *Merchants Refrigeration, supra,* is misplaced, for that case should be distinguished on its facts. That decision involved quarterly payments which were imposed upon the shipper from the outset of rail service over a newly constructed, elevated spur. In the cited case, service over the elevated spur was initiated upon the condition that the shipper undertake to reimburse the carrier by making so-called rent payments, which were designed to compensate the carrier for the cost of acquiring the right-of-way, the cost of constructing and maintaining the spur, and a return on investment.

The same distinguishing fact existed in the *Ziegler Bros.* case, *supra,* where the assailed payments arose pursuant to a valid construction contract executed by the shipper and carrier prior to the installation of the switch connection. Again, service over the switch connection was conditioned from the outset upon the shipper's undertaking to compensate the carrier for the costs associated with the switch connection. In regard to the *Ziegler Bros.* decision, we note that the Commission found that it lacked jurisdiction to determine the lawfulness of the particular contractual obligations at issue therein. We now find that this disclaimer of jurisdiction was unduly broad. Section 1(9) was enacted to facilitate the installation of switch connections. The purpose of section 1(9) can be defeated just as well by failure to operate a switch connection on reasonable terms as by a refusal to construct in the first instance. Had the Commission ordered the construction of the switch connection here in issue, that order upon the application of a party to the agreement upon the showing of changed circumstances could, without doubt, be modified by the Commission. While the Commission has been careful not to interfere with contractual disputes concerning costs of construction and maintenance of switch connections, *Merchants* case, *supra,* it is inconsistent to hold that the Commission can prescribe reasonable compensation for construction when it orders institution, but can not review the reasonableness of such compensation if voluntarily agreed to by the parties. Moreover, maintenance costs are usually changeable to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection. An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent

FINAL DECISION OF THE INTERSTATE COMMERCE COMMISSION



established the reasonableness of the additional maintenance charges. See *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973).

The Commission has broad authority to investigate and resolve allegations of unjust discrimination and undue preference or prejudice. See *United States* v. *Baltimore & O. R. Co.*, 333 U.S. 169 (1948). However, respondent errs in suggesting that its absorption of maintenance expenses unjustly discriminates against or unduly prejudices smaller shippers not having a private sidetrack upon which to accept delivery of their traffic. The existence of separate delivery facilities, one of which is dedicated to purely private use, while the other serves the public at large, does indeed constitute differing levels of service, but such differing levels of service does not, in this situation, constitute unjust discrimination nor undue preference or prejudice. The levels of service correspond to the volume of traffic generated by a particular facility, and the record contains no intimation that an equivalent switch connection is not readily available to all shippers having the same or greater volume of traffic interchanged as does petitioner. Volume of traffic is the criterion legislatively prescribed by section 1(9), which requires a carrier to establish a switch connection only where that connection " *** will furnish sufficient business to justify *** (its) construction and maintenance."

Respondent also errs in suggesting that smaller shippers are subsidizing the private facilities of General Motors by paying the same line-haul charges as petitioner while being relegated to team track delivery. The railroad's contention that private sidetrack placement is more costly than public team track placement ignores the fact that these facilities are part and parcel of the same transportation system and that existence of one enables the other to operate efficiently. The congestion and inconvenience that would presumably attend the diversion of private sidetrack traffic to public facilities would make public team track placement more costly than it presently is and would raise substantial questions as to the LIRR's compliance with section 1(6).

We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is

# FINAL DECISION OF THE INTERSTATE COMMERCE COMMISSION



reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial. See *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), citing *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968) and *Unloading Lumber at New York Harbor*, 256 I.C.C. 463 (1943). Contrary to respondent's contention, the record before us contains no basis for concluding that the LIRR's recent financial deficits and its nonparticipation in recent general increases constitute a sufficient substitute for showing the reasonableness of its maintenance charge.

We find that, on the present record, respondent may not lawfully impose the proposed maintenance charge upon petitioner and that, in the absence of a change in the practicability, safety, or sufficiency of traffic to petitioner's sidetrack, respondent may not terminate service over the involved switch connection.

COMMISSIONER CORBER, concurs in the result.

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*It is ordered*, That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 3, Acting as an Appellate Division.

ROBERT L. OSWALD,
*Secretary.*

(SEAL)

351 I.C.C.

THIRD-PARTY SUMMONS.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

GENERAL MOTORS CORPORATION
A Corporation of the State of Delaware,

Plaintiff,

72 C 1549

-against-

THE LONG ISLAND RAILROAD COMPANY,
A Corporation of the State of New York,

Defendant.

THIRD-PARTY SUMMONS

----------x

THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff,

-against-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants.

----------x

To the above-named Third-Party Defendants:

You are hereby summoned and required to serve upon LEONARD F. CHARLA, ESQ., General Motors Corporation, 3044 West Grand Boulevard, Detroit, Michigan 48202; BENSON T. BUCK, ESQ., General Motors Corporation, 3044 West Grand Boulevard, Detroit, Michigan 48202; JOHN F. DONELAN, ESQ., FREDERIC WOOD, ESQ., 914 Washington Building,

THIRD-PARTY SUMMONS

Washington, D.C. 20005; ROSS L. MALONE, ESQ., JOHN J. HIGGINS, ESQ., General Motors Corp., 767 Fifth Avenue, New York, N. Y. 10022, and upon GEORGE M. ONKEN, attorney for above-named defendant and third-party plaintiff, THE LONG ISLAND RAIL ROAD COMPANY, Jamaica Station, Jamaica, New York 11435, an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

_____
Clerk of the Court

By_____
Deputy Clerk

(Seal of Court)

Date:

THIRD-PARTY COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

GENERAL MOTORS CORPORATION
A Corporation of the State of Delaware,

Plaintiff,

-against-

THE LONG ISLAND RAILROAD COMPANY,
A Corporation of the State of New York,

Defendant.

----------x

72 C 1549

VERIFIED THIRD-PARTY COMPLAINT

THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff,

-against-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants.

----------x

Third-party plaintiff, THE LONG ISLAND RAIL ROAD COMPANY, (hereinafter "LIRR"), by its attorney, GEORGE M. ONKEN, as and for a third-party complaint and cause of action against third-party defendants, above mentioned, alleges upon information and belief:

1. This third-party cause of action joins the INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA as necessary

parties defendants to this action and seeks to review, enjoin, annul and set aside the orders of the Interstate Commerce Commission, dated June 10, 1975, and February 3, 1976, in the proceeding before the Commission under Docket No. 35790 and entitled Joint Petition for Declaratory Order - Private Sidetrack - General Motors Corporation and The Long Island Railroad Company, which orders, inter alia, held that (1) LIRR cannot lawfully require General Motors Corporation (hereinafter "GM") to bear the expense of maintaining a switch connection located on Railroad property, and (2) LIRR cannot lawfully stop rail service to GM siding upon GM's refusal to bear the expense of maintaining such switch connection.

2. The third-party defendants are the UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION. The form of action and venue of this Court are specified in 28 U.S.C. §§ 1336(b), 1398(b) and 2321-2325.

3. At all the times hereinafter mentioned, third-party plaintiff, LIRR, was and still is a railroad corporation duly organized and existing under and by virtue of the laws of the State of New York and was and still is engaged in business as a common carrier for hire in the transportation of passengers and property in intrastate commerce within the State of New York and interstate and foreign commerce. The line of railroad of the third-party plaintiff and its physical assets are all located within the State of New York,

and the principal office of plaintiff is located at Jamaica, Queens County, State of New York.

4. At all times hereinafter mentioned, third-party plaintiff, LIRR, was and still is a wholly owned subsidiary of the Metropolitan Transportation Authority, a public benefit corporation of the State of New York, created pursuant to Title 11 of the Public Authorities Law of the State of New York.

5. Under date of November 14, 1972, General Motors Corporation (hereinafter "GM") filed a summons and complaint in the United States District Court, Eastern District of New York and served an order to show cause upon defendant, The Long Island Rail Road Company (hereinafter "LIRR"). A copy of said summons and complaint is annexed hereto and made a part hereof as Exhibit "A."

6. Said order to show cause contained a temporary restraining order restraining LIRR from interfering in any manner with the switch connection from LIRR's line of track adjacent to GM's Parts Distribution Center facility at Bethpage, New York, from suspending service over said switch connection and from interfering with freight car movements into or out of said premises, pending a hearing on December 7, 1972, upon GM's motion for a preliminary injunction.

7. On December 5, 1972, both GM and LIRR moved this Court for a continuance of the temporary restraining order, at which time, at the request

of the Court, both parties agreed to institute a collateral proceeding with the Interstate Commerce Commission for an advisory opinion on the question in dispute.

8. Accordingly, by Order dated December 7, 1972, this Court ordered the parties to submit the dispute to the ICC by filing the required petition within 60 days and further ordered the prevailing party to bring an appropriate motion within 30 days of the final decision of the ICC. By further Order dated February 16, 1973, the time to file the aforementioned petition was extended by the Court to March 5, 1973.

9. On March 3, 1973, the parties, pursuant to the order of this Court, filed a joint petition with the Interstate Commerce Commission seeking a declaratory order under Section 554(e) of the Administrative Procedure Act to settle an existing controversy relating to matters arising under Section 1 of the Interstate Commerce Act including specifically, paragraph 9 thereof. The matter was assigned Docket No. 35790.

10. By order dated June 29, 1973, the Commission directed that this matter be handled under its modified procedure and by order dated August 2, 1973, the Commission permitted the National Industrial Traffic League to intervene in the proceeding.

11. By order dated April 1, 1974, the proceeding was referred to Administrative Law Judge Richard S. Ries for an initial decision.

THIRD-PARTY COMPLAINT

12. Under date of May 6, 1974, the Administrative Law Judge rendered his initial decision and held that (1) LIRR cannot lawfully require GM to bear the expense of maintaining a switch connection located on railroad property, and (2) LIRR cannot lawfully stop rail service to GM's siding upon GM's refusal to bear the expense of maintaining said switch connection.

13. On June 10, 1975, the Interstate Commerce Commission, Division 3, issued a decision and order which adopted and affirmed the statement of facts, conclusions and findings of the Administrative Law Judge. Commissioner O'Neal submitted a dissenting opinion to said decision and order.

14. LIRR thereupon petitioned the Interstate Commerce Commission for a reconsideration of its Decision and Order dated June 10, 1975.

15. On March 17, 1976, the Interstate Commerce Commission served a Report and Order Upon Reconsideration dated February 3, 1976, and reported at 351 ICC 691, which affirmed its prior decision and order.

16. This Court should not review the ICC's orders until the UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION are made parties hereto and given the opportunity to defend the aforesaid Reports and Orders.

THIRD-PARTY COMPLAINT

17. The aforesaid Reports and Orders are unlawful and should be enjoined, declared null and void, and set aside by this Court because the Interstate Commerce Commission improperly and erroneously interpreted and applied Section 1(9) of the Interstate Commerce Act.

WHEREFORE, third-party plaintiff, THE LONG ISLAND RAIL ROAD COMPANY, requests that the Court:

a. Order that the INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA be joined as necessary parties to this action;

b. Issue an Order enjoining, setting aside and annulling the Reports and Orders of the INTERSTATE COMMERCE COMMISSION dated June 10, 1975, and February 3, 1976; and

c. Grant third-party plaintiff such other and further relief as may seem lawful, just and proper.

George M Onken

GEORGE M. ONKEN
Attorney for Defendant and
Third-Party Plaintiff, The
Long Island Rail Road Company
Jamaica Station
Jamaica, New York 11435

(Verified by Margaret I. Kehoe, March 31, 1976.)

ORDER GRANTING INTERVENTION OF NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GENERAL MOTORS CORPORATION

Plaintiff

v.

THE LONG ISLAND RAILROAD COMPANY

Defendant

THE LONG ISLAND RAILROAD COMPANY

Third-Party Plaintiff

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Third-Party Defendants

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Applicant for Intervention

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
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MAY 18 1976
TIME A.M.....
P.M.....

No. 72-C-1549

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ORDER GRANTING INTERVENTION OF
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE
AS A THIRD-PARTY DEFENDANT

Upon consideration of the motion of The National Industrial Traffic League dated May 7, 1976 for leave to intervene, it appears that the League was a party in interest to the proceedings before the Interstate Commerce Commission, that this action

ORDER GRANTING INTERVENTION OF NATIONAL INDUSTRIAL TRAFFIC LEAGUE

involves the interest of the League, and that it is therefore entitled to intervene as of right.

IT IS THEREFORE ORDERED:

That The National Industrial Traffic League be permitted to intervene in this action as a third-party defendant.

Jacob Mechem
UNITED STATES DISTRICT JUDGE

Dated May 12, 1976.

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE THIRD-PARTY COMPLAINT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GENERAL MOTORS CORPORATION,

Plaintiff,

v.

THE LONG ISLAND RAILROAD COMPANY,

Defendant. 72-C-1549

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THE LONG ISLAND RAILROAD COMPANY,

Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants.

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ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE THIRD-PARTY COMPLAINT

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The Interstate Commerce Commission third-party defendant herein, answers the third-party complaint as follows:

I.

Admits the allegations of paragraph 1 of the third-party complaint, except as to the necessity of the United States of America as a party, to which the Commission is without sufficient knowledge to form a belief.

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE THIRD-PARTY COMPLAINT

II.

As to paragraph 2 of the third-party complaint, admits that the Interstate Commerce Commission is a defendant, but states that the Commission is without sufficient knowledge to form a belief whether the United States of America is a proper third-party defendant. Admits that the form of action and venue are established by 28 U.S.C. §§1336(b), 1398(b), but denies the applicability of 28 U.S.C. §§2321-2325.

III.

Admits each and every allegation of paragraphs 3 through 15 of the complaint.

IV.

As to paragraph 16 of the complaint, admits that the Interstate Commerce Commission is an indispensable party to this action, but the Commission states that it does not have sufficient knowledge to form a belief as to whether the United States of America is a necessary party to this action.

V.

Denies the allegations of paragraph 17 of the third-party complaint.

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE THIRD-PARTY COMPLAINT

WHEREFORE, the Interstate Commerce Commission, third-party defendant, prays that the Court:

a. deny all relief requested by the third-party plaintiff and dismiss the third-party complaint.

b. grant third-party defendant, Interstate Commerce Commission, such other relief as may be deemed lawful, just and proper.

ARTHUR J. CERRA
General Counsel

RAYMOND MICHAEL RIPPLE
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

ANSWER OF THE UNITED STATES OF AMERICA TO THE THIRD-PARTY COMPLAINT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GENERAL MOTORS CORPORATION,

Plaintiff,

v.

THE LONG ISLAND RAILROAD COMPANY,

Defendant.

72-C-1549

THE LONG ISLAND RAILROAD COMPANY,

Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants.

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THE LONG ISLAND
RAIL ROAD COMPANY

## ANSWER OF THE UNITED STATES OF AMERICA TO THE THIRD-PARTY COMPLAINT

The United States of America, third-party defendant herein, answers the third-party complaint as follows:

I.

Admits generally the allegations of paragraph 1 of the complaint and admits that the United States has been duly served and is a party to this action, but neither admits nor denies that the United States is a necessary party.

II.

Admits each and every allegation of paragraph 2 through 15 of the complaint.

ANSWER OF THE UNITED STATES OF AMERICA TO THE THIRD-PARTY COMPLAINT

III.

As to paragraph 16 of the complaint, admits that both the United States and the Interstate Commerce Commission have been made parties hereto.

IV.

Denies the allegations of paragraph 17 of the complaint.

WHEREFORE, the United States of America requests that the third-party complaint be dismissed and all relief denied.

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

LLOYD JOHN OSBORN
Attorney

DAVID G. TRAGER
United States Attorney

J. CHRISTOPHER JENSEN
Assistant United States Attorney

Attorneys for the United States of America

ANSWER OF INTERVENING THIRD-PARTY DEFENDANT, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE TO THE THIRD-PARTY COMPLAINT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| GENERAL MOTORS CORPORATION<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAILROAD COMPANY<br><br>Defendant<br><br>THE LONG ISLAND RAILROAD COMPANY<br><br>Third-Party Plaintiff<br><br>v.<br><br>UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION<br><br>Third-Party Defendants<br><br>THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE<br><br>Applicant for Intervention | ) | No. 72-C-1549 |

ANSWER OF INTERVENING THIRD-PARTY DEFENDANT,
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Intervening third-party defendant, The National Industrial Traffic League, answers the third-party complaint herein as follows:

ANSWER OF INTERVENING THIRD-PARTY DEFENDANT, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE TO THE THIRD-PARTY COMPLAINT

I.

Admits the allegations of paragraphs 1 through 3, inclusive, 5 through 8 inclusive, and 16.

II.

Does not have sufficient information to form a belief regarding the truth of the allegations of paragraph 4.

III.

Admits the allegations of paragraphs 9 through 15, but respectfully refers the court to the record of the proceedings before the Interstate Commerce Commission for a full and complete description.

IV.

Denies the allegations of paragraph 17.

ANSWER OF INTERVENING THIRD-PARTY DEFENDANT, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE TO THE THIRD-PARTY COMPLAINT

WHEREFORE, intervening third-party defendant, The National Industrial Traffic League, prays that the relief requested by Third-party plaintiff be denied and its complaint dismissed.

Respectfully submitted,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE
1909 K Street, N.W. (Suite 410)
Washington, D.C. 20006

By: Arthur M. Wisehart
219 East 42nd Street
New York, N.Y. 10017
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Of Counsel:

Wisehart & Koch
219 East 42nd Street
New York, N.Y. 10017

Donelan and Cleary
914 Washington Building
Washington, D.C. 20005

Dated: May 7, 1976

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br>A Corporation of the State<br>of Delaware<br><br>Plaintiff<br><br>v.<br><br>THE LONG ISLAND RAIL ROAD CO.<br>A Corporation of the State<br>of New York<br><br>Defendant<br><br>THE INTERSTATE COMMERCE COMMISSION<br>and UNITED STATES OF AMERICA<br><br>Third Party Defendants<br><br>NATIONAL INDUSTRIAL TRAFFIC LEAGUE<br><br>Intervenors | CIVIL ACTION NO. 72-C-1549 |

## STATEMENT OF THE CASE

This is an action in which the Plaintiff seeks determination of its right to a rail (railroad) switch connection under Section 1(9) of the Interstate Commerce Act (49 U.S.C.A. §1(9)). The matter was referred by this Court to the Interstate

Commerce Commission. The Interstate Commerce Commission determined that Plaintiff had a right to the connection and found the charges proposed by the Defendant related to this switch connection were not shown to be justified. The Commission's Decision is found in Docket No. 35790, General Motors Corporation v. The Long Island Rail Road Company, printed at 351 I.C.C. 691 (1976). Defendant questions the Decision and Order of the Commission. Plaintiff seeks an Order from this Court affirming the Decision and Order of the Commission and permanently enjoining suspension of service over the switch connection by Defendant. This Court has jurisdiction of the subject matter pursuant to §17(9) of the Interstate Commerce Act (49 U.S.C. §17(9), and 28 U.S.C. §§1336, 1337, and 1398.

## INTRODUCTION

In the United States, shippers and receivers of freight by railroad accept freight deliveries in one of two ways: they use facilities maintained by the carrier for use by the shipping public; or they possess private rail trackage and unloading facilities adjacent to rail lines operated by the several rail carriers.

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

Section 1(9) of the Interstate Commerce Act, (49 U.S.C.A. §1(9)) requires the railroads to install and maintain switch connections between their lines and the private sidings of shippers to facilitate movement of goods by rail. This statute has the effect of preventing discrimination by the carriers against particular shippers.

In essence, the rail carriers are required to install switches so that all shippers whose volume of freight justifies it may have equal access to direct rail service.

Plaintiff is seeking the protection of this Court from denial of its right to a switch connection by Defendant.

In support of its position, Plaintiff will show that the matter is one properly before the Commission; that the Commission's conclusions had a rational basis; that the Commission's findings were adequate and based upon substantial evidence; that judicial review of Commission decisions is limited in scope; that, all conditions for affirmation having been met, the Order of the Commission should be affirmed; and that Defendant should be permanently enjoined from suspending service over Plaintiff's switch connection.

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

## STATEMENT OF FACTS

The facts are stated in the joint Complaint of the parties, submitted to the Interstate Commerce Commission in March of 1973; however, Plaintiff believes a brief review of the facts may be helpful. There is no dispute as to any issue of fact.

General Motors Corporation (hereinafter sometimes referred to as "GM" or "Plaintiff"), is a Delaware Corporation duly qualified and licensed to transact business in the State of New York. Plaintiff functions through several unincorporated divisions, one of which is the General Motors Parts Division (hereinafter sometimes referred to as "GMPD" or "GM Parts Division"). GM Parts Division is, and has been for some time prior to the times referred to in its Complaint, carrying on warehousing, sales and distribution operations on premises which are located within the County of Nassau, State of New York, and in the municipality of Bethpage, Long Island, said premises being known as General Motors Parts Distribution Center, and lying within the jurisdiction of this Court. Said Parts Distribution Center is located on a line of the Long Island Rail Road

Company (hereinafter sometimes referred to as "LIRR" or "Defendant"). An existing switch connects the railroad line to the GMPD sidetrack.

Defendant is a common carrier by rail of freight and, as such, is subject to the provisions of the Interstate Commerce Act, Title 49, U.S.C. §1, et seq., and to regulations issued and promulgated by the Interstate Commerce Commission (hereinafter sometimes referred to as "I.C.C." or "the Commission"), under its statutory powers. Defendant has been serving Plaintiff's aforementioned operations at Bethpage, Long Island, New York, via a switch connection leading from Defendant's railroad line to a sidetrack located on property of Plaintiff and operated by Plaintiff.

Plaintiff receives approximately fifteen rail freight cars of auto parts every week at its Parts Distribution Center at Bethpage moving from various origins in the United States, which shipments have traditionally been transported in rail service.

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

Defendant participates in and is a party to rates and schedules lawfully on file with the Commission thereby holding itself out to transport and deliver automobile parts and accessories to Plaintiff's place of business at Bethpage, Long Island and pursuant to the provisions of §1 of the Interstate Commerce Act has provided and maintained the necessary switch connection with Plaintiff's industrial sidetrack at Bethpage, Long Island, New York. Defendant is obligated as a common carrier by rail pursuant to the requirements of §1 of the Interstate Commerce Act, including Sections 1(9) and 1(6), to continue delivering rail car shipments of automobile parts and accessories to Plaintiff's place of business at Bethpage, Long Island, until the rates are permitted to be cancelled or service discontinued in accordance with the requirements of the Interstate Commerce Act.

On or about the 30th day of October, 1972, the LIRR threatened to place out of service the switch track connecting sidetrack serving Plaintiff's Parts Distribution Center at Bethpage, Long Island, New York, to Defendant's main line.

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

Plaintiff sought and received a Temporary Restraining Order on November 14, 1972, at 4:30 p.m., which required the Defendant, Long Island Rail Road to maintain service over the switch connection. Pursuant to a subsequent Temporary Restraining Order of this Court, dated December 7, 1972, the parties submitted the matter to the Commission for a Declaratory Order. The I.C.C. ruled in favor of Plaintiff by Order dated February 3, 1976, served on March 17, 1976. The Temporary Restraining Order of this Court expired on April 19, 1976. However, the Defendant has agreed not to suspend service to Plaintiff while this litigation is pending. By Complaint filed on March 31, 1976, Defendant joined the I.C.C. and the United States of America as Third Party Defendants and seeks to have the Order of the Commission set aside. Plaintiff seeks to have the Order of the Commission affirmed and Defendant permanently enjoined from suspending service over the switch.

PROCEEDINGS BEFORE THE
INTERSTATE COMMERCE COMMISSION

Pursuant to the Order dated December 7, 1972, of this Court, directing the parties to submit the dispute to the I.C.C. by filing the required petition within 60 days and further Order

of this Court dated February 16, 1973, extending the time for filing, the time to file the aforementioned petition was extended to March 5, 1973. Plaintiff and Defendant filed a joint petition with the Interstate Commerce Commission on March 3, 1973, seeking a Declaratory Order under Section 554(e) of the Administrative Procedure Act (5 U.S.C.A. §554(e)); the Commission was asked to resolve the instant controversy concerning various issues within the primary jurisdiction of the Interstate Commerce Commission. The matter was assigned Docket No. 35790 by the Commission.

By Order dated June 29, 1973, the Commission set the matter for modified procedure. Subsequently, the National Industrial Traffic League (hereinafter sometimes referred to as "NIT League"), was permitted to intervene in support of Petitioner, by Order dated August 2, 1973. By Order dated April 1, 1974, the matter was referred to Administrative Law Judge Richard S. Ries, for an Initial Decision.

Administrative Law Judge Ries issued an Initial Decision and Order dated May 6, 1974, and served May 21, 1974, and held that: 1) LIRR cannot lawfully require GM to bear the expense of maintaining a switch connection located on railroad

property; and 2) LIRR cannot lawfully stop rail service to GM's siding upon GM's refusal to bear the expense of maintaining said switch connection. LIRR filed exceptions to the Initial Decision of the Administrative Law Judge and GM and NIT League filed statements in reply.

By Order dated June 10, 1975, and served June 17, 1975, the Commission, Division 3, affirmed the Initial Decision of the Administrative Law Judge. The Order held the Long Island Rail Road may not lawfully precondition continued rail service to the private sidetrack of GM upon GM's agreement to bear the maintenance expenses for the switch connection to the private sidetrack.

LIRR petitioned the I.C.C. for reconsideration of its Decision and Order dated June 10, 1975. GM and NIT League opposed this petition on procedural grounds.

Subsequently, the Commission, Division 3, reopened the proceeding on its own motion. In a Decision dated February 3, 1976, and served March 17, 1976, the Commission, Division 3, acting as an appellate division served a Report and Order on Reconsideration again affirming its previous Decision. The Report and Order is printed at 351 I.C.C. 691.

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

By Third Party Complaint dated March 31, 1976, the LIRR joined the I.C.C. and United States of America as Third Party Defendants and sought to have the Reports and Orders of the I.C.C. dated June 10, 1975, and February 3, 1976, set aside. In a pretrial conference on May 7, 1976, the instant brief was scheduled, and trial was set for September 17, 1976.

## STATUTES INVOLVED

Primarily involved in this proceeding are two statutes governing the duties and responsibilities of carriers.

Section 1(6) of the Interstate Commerce Act (49 U.S.C.A. §1(6)) provides:

> "(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions

of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice in prohibited and declared to be unlawful."

Section 1(9) of the Interstate Commerce Act (49 U.S.C.A. §1(9)) provides:

"(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance

with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

## QUESTIONS PRESENTED

(1) Whether there is a rational basis for the Commission's conclusion that the Defendant LIRR's attempt to condition continued rail service at shipper's private sidetrack upon Plaintiff GM's agreement to bear the switch connection maintenance expense was unlawful.

(2) Whether adequate findings based on substantial evidence support the Commission's conclusions that the expenses attributable to delivering freight should be met from a carrier's line-haul revenues and that Defendant Long Island's statutory obligation to provide switch connection service, under Section 1(9) of the Act, to GM, at Bethpage remains.

## ARGUMENT

### I.

### THERE IS A SOUND AND RATIONAL BASIS FOR THE COMMISSION'S DECISION

#### A. The Matter Was One Which Was Properly Submitted to the Interstate Commerce Commission

This Court properly directed this case to the Commission pursuant to authority contained in Section 5(e) of the Administrative Procedure Act (5 U.S.C.A. §554(e)) which provides in part:

> "§554 Adjudications
> (e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

The instant matter falls squarely within the language of the statute permitting submission of questions to agencies for declaratory orders, being both an existing controversy involving a carrier and an area of uncertainty as to interpretation of the Interstate Commerce Act.

### B. The Initial Decision of the Administrative Law Judge Was Correct And Had a Rational Basis

The Initial Decision of Administrative Law Judge Ries, dated May 6, 1974, and served May 21, 1974, made two findings as follows:

> "Upon joint petition for a declaratory order found that (1) respondent [LIRR] cannot lawfully require petitioner [GM] to bear the expense of maintaining a

> switch connection located on railroad property and (2) respondent cannot lawfully stop rail service to petitioner's siding upon refusal of petitioner to bear the expense of maintaining respondent's switch connection . . ."

A reading of the Initial Decision reveals that the Administrative Law Judge fully and adequately considered all of the evidence submitted to the Commission. The parties are identified (p. 3, Initial Decision); the facts are stated and the statute set forth in pertinent part (pp. 2-3, Initial Decision). The issue is identified and clearly set forth (pp. 3-4, Initial Decision):

> "The issue here involved is whether or not it is lawful for a railroad to require a shipper to bear the entire expense of maintaining a railroad owned switch connection between an industrial sidetrack and the carrier's main line, even though the switch connection lies upon the property and right-of-way of the carrier.
>
> Subsidiary to the foregoing issue, is the question of whether or not the respondent has a right to refuse to serve the industrial sidetrack if petitioner refuses to execute the sidetrack agreement tendered it by respondent."

Carefully treated is the question of the Commission's jurisdiction. The Administrative Law Judge properly found that

the Commission had the discretion to issue a Declaratory Order in this matter and that its determination of the questions in this proceeding was a proper exercise of its authority (p. 4, Initial Decision).

The Administrative Law Judge also sets forth the contentions of LIRR and GM and carefully analyzed them in his Discussion and Conclusions (p. 6, ff., Initial Decision).

Paragraph 2 of the Discussion and Conclusions sets forth the history of §1(9), (p. 6, Initial Decision). Paragraph 3 of the Discussion and Conclusions states:

> "The switch connection was established in 1965 on a voluntary basis in accordance with section 1(9) of the act. It may be assumed that the conditions prerequisite to the construction of the switch connection were met in the opinion of the railroad or its construction would not have been authorized. . ."
> (p. 6, Initial Decision)

The Administrative Law Judge provides a well-reasoned analysis of Merchants Refrigeration Co. v. N.Y.C.R.R., 238 I.C.C. 599 (1940), cited by LIRR to support the proposition that it had the legal right to assess a charge against GM for the switch connection (pp. 6-8, Initial Decision). The Merchants

case was found to be distinguishable on its facts (p. 7, Initial Decision). The Supreme Court is cited on the railroad's obligation to perform service over established switch connections:

> "Once a switch connection is established between a railroad and a private industrial sidetrack of an industry the carrier holds itself out to perform the service as respondent has done by participating in published line-haul rates. The Supreme Court of the United States has summarized a railroad's obligation in this regard as follows:
>
> > 'The general rule is that it is the responsibility of the carrier, as part of the transportation service caused by the line-haul rate, to "deliver" the goods by placing them in such a position as to make them accessible to the consignee * * * in the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding.' " Citing Sec'y of Agriculture v. U.S., 347 U.S. 645, 647; 98 L. Ed. 1015, 74 S.C. 826 (1954) (p. 8, Initial Decision)

The Administrative Law Judge concluded:

> "Upon consideration of all the evidence, the Administrative Law Judge finds that the Commission has the authority under the Administrative Procedure Act to determine the questions in issue in this proceeding;

> that respondent cannot lawfully require petitioner to bear the expense of maintaining a switch connection including sidetrackage located entirely on the right-of-way of respondent; that respondent cannot lawfully stop servicing the petitioner's facility where petitioner refuses to execute a sidetrack agreement obligating it to bear the expense of maintaining respondent's switch connection; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969."
> (p. 9, Initial Decision)

C. The Commission Properly Adopted The Findings of the Administrative Law Judge

Recognizing that the Judge Ries' Initial Decision was in full accord with the plain language of §1(9) of the Interstate Commerce Act, and was entirely consistent with the prior decisions of the Commission including that of the Merchants Refrigeration case, the Commission, having considered the complaint and record, including the Initial Decision of Judge Ries and the exceptions of the LIRR and replies thereto by GM and the NIT League, the Commission, Division 3, by Order dated June 10, 1975, and served June 17, 1975, found that the exceptions did not show any material errors in the Administrative Law Judge's statement

and evaluation of facts, conclusions of law, and findings; and affirmed and adopted the Initial Decision of the Administrative Law Judge as its own.

## II.

IN RECONSIDERING THE MATTER ON ITS OWN MOTION THE COMMISSION MADE ADEQUATE FINDINGS BASED ON SUBSTANTIAL EVIDENCE WHICH PROPERLY MET AND SUCCESSFULLY REFUTED THE EXCEPTIONS AND OBJECTIONS RAISED BY THE DEFENDANT

In its Report and Order on Reconsideration decided February 3, 1976, and served March 17, 1976, the Commission, acting on its own motion, again thoroughly reviewed the record and considered, and properly refuted the contentions of the LIRR. The findings of the Commission were adequate and competent, and were based upon substantial evidence. The Decision is in full accord with previous decisions of the Commission and the Courts. In its Report and Order the Commission noted at p. 693:

> "Respondent defends its levy of switch connection maintenance charges upon the language of section 1(9) of the Act, which, when given its plain meaning, allegedly authorizes a carrier to impose maintenance charges upon the shipper being served by a particular switch connection. In support of its position, the LIRR emphasizes the following underscored portions of section 1(9):

'Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.' "

The Commission's discussion of this contention is lucid, coherent, and cogent. It illuminates the statute and renders the contention of Defendant meaningless:

> "Among the various obligations of a common carrier by rail is the duty to establish switch connections, as set out in section 1(9) of the Act. The first sentence of that section obligates a carrier to establish a switch connection with a lateral branch line or a private sidetrack once certain specified conditions are determined to exist. The second sentence of that section prescribes a remedy for shippers or branch line owners who are unable to secure a voluntarily established switch connection. Since the switch connection involved here was voluntarily established, our concern in this proceeding is the proper interpretation of the first provision of section 1(9), that is, the carrier's obligation to construct, maintain, and operate a switch connection.
>
> Contrary to respondent's argument, a carrier's obligation to establish a switch connection is not to be determined by the presence or absence of a contractual arrangement setting out 'reasonable terms'. Rather, the plain meaning of the statute suggests that a carrier's obligation with regard to switch connections is qualified by the following three conditions: that the switch connection is reasonably practicable; that the switch connection can be installed and operated with safety; and that the switch connection will furnish sufficient business to justify its construction and maintenance."
> (351 I.C.C. at pp. 695-96)

In the instant case, it is undisputed that these three conditions imposed by the first three sentences of Section 1(9) were met, and still exist.

1) The switch connection at Bethpage was and is reasonably practicable;

2) The switch connection was installed and is operated with safety;

3) Finally, sufficient business was and is being furnished to justify its continued existence and maintenance.

The Commission duly recognized the existence of these conditions, and so stated. The Commission further recognized that the cost of maintaining the switch connection was properly attributable to the LIRR's line-haul revenues.

> "Apparently satisfied that the necessary conditions were present, the LIRR constructed the switch connection at its own expense and similarly absorbed the maintenance expense for that connection up until the time the present controversy arose. This practice of absorbing the construction and maintenance expenses is in accord with section 1(6) of the Act, which, in part, requires rail carriers to adopt and observe just and reasonable practices for the safe and prompt delivery of freight. In light of respondent's prior absorption of maintenance of expenses, we do not believe that respondent's attempt to transfer the switch connection maintenance obligation to petitioner is consistent with

> the carrier's obligation to deliver petitioner's freight. The task of delivering freight is an integral [i.e. integral part] of the transportation obligation, and therefore, as a general rule, the delivery of freight is a service performed under a carrier's line-haul rate. Correspondingly, the expenses attributable to delivering freight should generally be met from a carrier's line-haul revenues. See Propriety of Operating Practices - Packing Sheds, 246 I.C.C. 273, 283 (1941), and Split Deliveries and Drayage Allowance at New York, 245 I.C.C. 40, 41 (1941)"
> (351 I.C.C. 696)

The second contention of the LIRR treated by the Commission on reconsideration is that in prior cases the Commission recognized a carrier's authority to impose a switch connection maintenance charge upon a shipper.

> "Respondent also argues that prior Commission decisions have recognized a carrier's authority to impose switch connection maintenance charges upon a shipper and that, therefore, our affirmance of the initial decision violates Commission precedent. The LIRR cites Merchants Refrigeration Co. v. New York Central R. Co., 238 I.C.C. 599, a 1940 decision wherein the Commission held that a railroad could recoup from a shipper the cost of constructing and maintaining an elevated spur track serving the shipper's private facility. Respondent argues that, in the cited case, the Commission described section 1(9) as containing an unqualified grant of authority to carriers to impose maintenance agreements upon shippers served by switch connections."
> (351 I.C.C. at 693-94)

The Commission met and refuted this contention. It correctly noted that Merchants, supra., and Ziegler Bros. v. Southern Ry. Co., 157 I.C.C. 660 (1929), also cited by the LIRR in support of its position were distinguishable on their facts from the facts of record in the instant case and that the LIRR's reliance on them was misplaced.

> "Respondent's reliance on Merchants Refrigeration, supra., is misplaced, for that case should be distinguished on its facts. That decision involved quarterly payments which were imposed upon the shipper from the outset of rail service over a newly constructed, elevated spur. In the cited case, service over the elevated spur was initiated upon the condition that the shipper undertake to reimburse the carrier by making so-called rent payments, which were designed to compensate the carrier for the cost of acquiring the right-of-way, the cost of constructing and maintaining the spur, and a return on investment."
> (351 I.C.C. at 697)

The Commission went on to discuss Ziegler, supra., and to specifically assert its jurisdiction over the instant issue.

> "The same distinguishing fact existed in the Ziegler Bros. case, supra., where the assailed payments arose pursuant to a valid construction contract executed by the shipper and carrier prior to the installation of the switch connection.

> Again, service over the switch connection was conditioned from the outset upon the shipper's undertaking to compensate the carrier for the costs associated with the switch connection. In regard to the Ziegler Bros. decision, we note that the Commission found that it lacked jurisdiction to determine the lawfulness of the particular contractual obligations at issue therein. We now find that this disclaimer of jurisdiction was unduly broad. Section 1(9) was enacted to facilitate the installation of switch connections."
> (351 I.C.C. at 697)

There follows a significant discussion by the Commission of the purpose of Section 1(9) of the Interstate Commerce Act.

> "The purpose of section 1(9) can be defeated just as well by failure to operate a switch connection on reasonable terms as by a refusal to construct in the first instance. Had the Commission ordered the construction of the switch connection here in issue, that order upon the application of a party to the agreement upon the showing of changed circumstances could, without doubt, be modified by the Commission. While the Commission has been careful not to interfere with contractual disputes concerning costs of construction and maintenance of switch connections, Merchants case, supra., it is inconsistent to hold that the Commission can prescribe reasonable compensation for construction when it orders institution, but can not review the reasonableness of such compensation if voluntarily agreed to by the parties. Moreover, maintenance costs are usually changeable [i.e., chargeable] to operating

> expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection. An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges. See Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973)."
> (351 I.C.C. at 697-98) (Emphasis Supplied)

The Commission states that the LIRR questions its conclusion as to the carrier's obligation to continue maintenance and operation of the switch connection conditioned upon GM's continuing to furnish sufficient business:

> "The LIRR assails our conclusion that the railroad is obligated to maintain and operate the switch connection as long as General Motors continues to furnish sufficient business at its private sidetrack. Our adoption of the 'sufficient business' criterion, which comes from the statutory language of section 1(9), is allegedly improper because that section of the Act employs the 'sufficient business' criterion only in relation to switch connections which are operated under a contractual arrangement setting out 'reasonable terms'. Here, the railroad contends, the maintenance and operation of the switch connection is being compelled without the benefit of any terms at all."
> (351 I.C.C. at p. 694)

However, the Commission deals with and thoroughly refutes that contention on page 698 of its Report and Order:

> "The Commission has broad authority to investigate and resolve allegations of unjust discrimination and undue preference or prejudice. See United States v. Baltimore & O. R. Co., 333 U.S. 169 (1948). However, respondent errs in suggesting that its absorption of maintenance expenses unjustly discriminates against or unduly prejudices smaller shippers not having a private sidetrack upon which to accept delivery of their traffic. The existence of separate delivery facilities, one of which is dedicated to purely private use, while the other serves the public at large, does indeed constitute differing levels of service, but such differing levels of service does not, in this situation, constitute unjust discrimination nor undue preference or prejudice. The levels of service correspond to the volume of traffic generated by a particular facility, and the record contains no intimation that an equivalent switch connection is not readily available to all shippers having the same or greater volume of traffic interchanged as does petitioner. Volume of traffic is the criterion legislatively prescribed by section 1(9), which requires a carrier to establish a switch connection only where that connection '* * * will furnish sufficient business to justify * * * (its) construction and maintenance.' "
> (351 I.C.C. at p. 698) (Emphasis Supplied)

The Commission recognizes and clearly sets forth the further contentions of the LIRR:

"Respondent also challenges our conclusion that, under the present line-haul rates, the LIRR must deliver petitioner's traffic to its private sidetrack and therefore, the railroad must look to its line-haul revenue to recoup its switch connection maintenance expense. According to the LIRR, its transportation obligation would be satisfactorily fulfilled if General Motors' traffic were diverted to the public team tracks at Hicksville (3 miles distant) or at Farmingdale (2 miles distant). Respondent alleges that under the present circumstances placement of cars at the private siding is more costly than is placement at public team tracks and that, accordingly, petitioner's traffic unduly burdens other interstate commerce. Continued absorption of the maintenance expenses is allegedly unjustly discriminatory and unduly prejudicial to smaller shippers who have no private facilities. Thus, the LIRR suggests, these smaller ships are, in effect, subsidizing the private facilities of General Motors.

Respondent further argues that the presumption that respondent's line-haul revenues are adequate to cover switch connection maintenance expenses is unfounded in light of the LIRR's nonparticipation in recent general increases. In this regard, our prior decision allegedly ignores our recent conclusions in other cases as to the uneven effects of general rate increases and the inadequacy of current railroad revenue division agreements." (351 I.C.C. at 694-95)

The Commission forthrightly stated the LIRR's at pp. 698-99 of its Report and Order:

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

"Respondent also errs in suggesting that smaller shippers are subsidizing the private facilities of General Motors by paying the same line-haul charges as petitioner while being relegated to team track delivery. The railroad's contention that private sidetrack placement is more costly than public team track placement ignores the fact that these facilities are part and parcel of the same transportation system and that existence of one enables the other to operate efficiently. The congestion and inconvenience that would presumably attend the diversion of private sidetrack traffic to public facilities would make public team track placement more costly than it presently is and would raise substantial questions as to the LIRR's compliance with section 1(6).

We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial. See Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973), citing Transit Charges, Southern Territory, 332 I.C.C. 664 (1968) and Unloading Lumber at New York Harbor, 256 I.C.C. 463 (1943). Contrary to respondent's contention, the record before us contains no basis for concluding that the LIRR's recent financial deficits

and its nonparticipation in recent general increases constitute a sufficient substitute for showing the reasonableness of its maintenance charge.

We find that, on the present record, respondent may not lawfully impose the proposed maintenance charge upon petitioner and that, in the absence of a change in the practicability, safety, or sufficiency of traffic to petitioner's sidetrack, respondent may not terminate service over the involved switch connection."
(351 I.C.C. p. 698-99)

Thus, the findings made by the Commission, Division 3, acting as an appellate division, were adequate, were based on substantial evidence, were in accord with prior decisions of the Commission, and met and successfully refuted all of the contentions of Defendant. For the foregoing reasons, the Commission's Decision in its Report and Order should be affirmed and upheld.

## III.

## JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION IS EXTREMELY LIMITED

On matters referred to the Interstate Commerce Commission for determination by a U.S. District Court, the referring court has exclusive jurisdiction of a civil action to enforce,

enjoin, set aside, annul, or suspend any Order of the Interstate Commerce Commission arising out of such referral. (28 U.S.C.A. §1336(b).) However, in its review of orders of the I.C.C., the Court is limited in the scope of its review by settled principles of administrative law, both General and Statutory. Eastern Central Motor Carriers Ass'n v. U.S., 239 F. Supp. 591 (1965); Roadway Express Inc. v. U.S., 213 F. Supp. 868, 873 (1963), aff'd 375 U.S. 12, 11 L. Ed. 2d 38, 84 S. Ct. 53 (1963); Pennsylvania Co. v. U.S., 236 U.S. 351, 59 L. Ed. 616, 35 S. Ct. 370 (1915); Illinois Central Railroad v. D. & W. R. Co., 385 U.S. 57, 17 L. Ed. 2d 162, 87 S. Ct. 255 (1966).

It has long been held that an Order of the Interstate Commerce Commission not unconstitutional and within its authority and supported by evidence cannot be set aside by the courts, and that a strong presumption exists in favor of the correctness of the Interstate Commerce Commission's decisions in its limited field. Pennsylvania Co. v. U.S., supra.; Seaboard Air Line R. Co. v. U.S., 131 F. Supp. 129 (1954), affirmed 75 S. Ct. 579, 349 U.S. 902, 99 L. Ed. 1239 (1955), rehearing denied 75 S. Ct. 781, 349 U.S. 941, 99 L. Ed. 1269 (1955).

BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

When the Interstate Commerce Commission resolves a question within its primary jurisdiction its resolution should not be set aside unless it exceeds the Commission's statutory authority or is unsupported by the weight of the evidence. Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F. 2d 334 (1970) cert. den. 400 U.S. 964, 27 L. Ed. 2d 383, 91 S. Ct. 365 (1970).

In reviewing an I.C.C. Decision, the Court's function is to insure that the Commission did not act in an arbitrary or capricious manner; that the Decision is supported by substantial evidence in the light of the record considered as a whole; and that the Decision was reached in accord with lawful procedure. 5 U.S.C.A. §706; Illinois Central Railroad Co. v. D. & W. R. Co., supra.

On referral of this matter to the Commission by this Court for a Declaratory Order, the Commission properly exercised its jurisdiction over the subject matter and followed correctly its own rules of procedure. The careful consideration of all the facts on the record and the entire decision-making process in this matter, were in full accord with lawful procedures.

Its Decision was a rational one, and its findings were adequate and were based upon substantial evidence, as shown above. This Court should affirm the Order of the Commission and issue a permanent injunction against suspension of service over Plaintiff's switch connection by the LIRR.

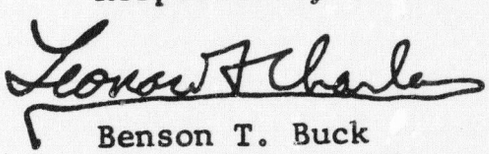
## CONCLUSION

This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. §§1336, 1337 and 1398 and 49 U.S.C.A. §17(9). It referred the question at issue to the Interstate Commerce Commission pursuant to 5 U.S.C.A. §554(e) for a Declaratory Order.

The Commission's handling of the matter was proper, and the Initial Decision of the Administrative Law Judge was correct and had a rational basis. The adoption of the findings of the Administrative Law Judge by the Commission was proper. The Commission, on reconsideration, made adequate findings based upon substantial evidence which properly met and substantially refuted the exceptions and objections raised by the Defendant, and which properly and lawfully interpreted and applied Section 1(9) of the Act.

**WHEREFORE**, Plaintiff General Motors Corporation requests that this Court affirm the Order of the Commission; and that this Court issue an Order permanently enjoining the LIRR from suspending service over Plaintiff's switch connection and for such additional relief as this Court may deem proper.

Respectfully submitted,



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BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF,
THE LONG ISLAND RAIL ROAD COMPANY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

GENERAL MOTORS CORPORATION
A Corporation of the State of Delaware,

Plaintiff,

72 C 1549

-against-

THE LONG ISLAND RAILROAD COMPANY
A Corporation of the State of New York,

Defendant.

----------x

THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff,

-against-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants.

----------x

BRIEF ON BEHALF OF DEFENDANT
AND THIRD-PARTY PLAINTIFF, THE
LONG ISLAND RAIL ROAD COMPANY

Preliminary Statement

The instant action is before the Court on the application of the plaintiff, General Motors Corporation, for a preliminary and permanent injunction restraining and enjoining the defendant and third-

party plaintiff, The Long Island Rail Road Company (hereinafter "LIRR"), from refusing to serve the private siding of the plaintiff, General Motors Corporation (hereinafter "GMC"), at Bethpage, New York, because of GMC's refusal to execute the standard private siding agreement tendered it by the LIRR which, inter alia, would require GMC to assume the cost of maintaining the switch connection.

## Prior Proceedings

This action was commenced by the filing in this Court of a summons and complaint by GMC on November 14, 1972, at which time this Court issued an order to show cause upon defendant, LIRR. Subsequently, on December 5, 1972, at a hearing before the late Hon. George Rosling, United States District Judge, at the request of the Court, the parties entered into a stipulation to refer the dispute to the Interstate Commerce Commission for an advisory opinion, and the LIRR consented to the issuance of a restraining order pending the decision of the Interstate Commerce Commission.

Pursuant to the direction of the Court in this proceeding, GMC and LIRR filed a joint petition on March 5, 1973, seeking a declaratory order under Section 554(e) of the Administrative Procedure Act regarding the existing controversy between the parties. The Interstate Commerce Commission (hereinafter "ICC" or "Commission"),

by order dated June 29, 1973, directed that the matter be handled under modified procedure and subsequently, permitted the National Industrial Traffic League (hereinafter "NIT") to intervene in support of GMC. Opening statements of fact and argument were filed by all parties, which included verified statements of witnesses and exhibits, and rebuttal statements were subsequently filed. By order dated April 1, 1974, the proceeding was referred to Administrative Law Judge Richard S. Ries for an Initial Decision, which he rendered under date of May 6, 1974, and which was served under date of May 21, 1974. The time to file exceptions to this Initial Decision was extended to July 22, 1974, upon which date the LIRR filed its exceptions to the aforesaid Initial Decision of the Administrative Law Judge.

Under date of June 10, 1975, the ICC, Division 3, issued a Decision and Order which adopted and affirmed the statement of facts, conclusions and findings of Administrative Law Judge Ries, with Commissioner O'Neal dissenting. The LIRR thereupon petitioned the ICC for reconsideration of its Decision and Order dated June 10, 1975, and under date of March 17, 1976, the ICC's Division 3, acting as an Appellate Division, served a Report and Order Upon Reconsideration dated February 3, 1976, affirming its prior Decision and Order. The aforesaid Report and Order in Docket No. 35790, dated February 3,

1976, is entitled Joint Petition for Declaratory Order -- Private Sidetrack -- General Motors Corporation and The Long Island Rail Road Company, and is reported at 351 I.C.C. 691.

Under date of March 31, 1976, the defendant, LIRR, filed with the Court a third-party summons and complaint naming the United States of America and Interstate Commerce Commission as third-party defendants. On May 7, 1976, a conference was held before the Hon. Jacob Mishler, United States District Judge, establishing August 2, 1976, as the date for filing and exchange of all briefs between the parties and establishing September 17, 1976, as the date for oral argument. Under date of May 7, 1976, NIT moved the Court for leave to intervene, which motion was granted by order of the Court dated May 17, 1976.

At the aforementioned conference on May 7, 1976, it was agreed among the parties that there was no dispute to the facts which were essentially as set forth in the various decisions and reports of the ICC under Docket No. 35790.

## ARGUMENT

### POINT I

### THIS COURT HAS JURISDICTION TO REVIEW, ENJOIN, SET ASIDE, ANNUL OR SUSPEND IN WHOLE OR IN PART THE DECISION OF THE INTERSTATE COMMERCE COMMISSION

The jurisdiction of this Court to review, enjoin, set aside, annul or suspend in whole or in part the orders of the ICC dated June 10, 1975, and February 3, 1976, is set forth in 28 U.S.C. Section 1336(b), P.L. 88-513 Section 1, which provides as follows:

> "When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral."

The effect and scope of this 1964 amendment has been interpreted in several decisions. Keller Industries, Inc. v. U.S., 304 F. Supp. 852 (N.D. Fla. 1969); Seaboard Airline R. Co. v. U.S., 387 F.2d 651 (U.S. Ct. Cl. 1967); McLean Trucking Co. v. U.S., 387 F.2d 657 (U.S. Ct. Cl. 1967).

The Court in the Keller Industries case, supra, noted at page 854 that prior to the enactment of the 1964 amendment to 28 U.S.C. Section 1336, judicial review of an ICC decision on a matter referred to it by a single-judge district court could only be had through the medium of a three-judge district court and that consequently, the referring Court had to await the decision of the three-judge district court, the Supreme Court, if an appeal was taken, and any other proceedings which might result from judicial decisions before it could proceed to final judgment. The Court went on to note that the 1964 amendment was designed to overcome this cumbersome and inefficient procedure, and since its enactment, the referring Court, rather than a three-judge district court, has reviewed the Commission's order because of its exclusive jurisdiction, citing McLean Trucking Co. v. U.S., supra. In Seaboard Airline R. Co. v. U.S., supra, the U.S. Court of Claims, after reviewing various contentions as to the scope of its judicial review under 28 U.S.C. 1336(b) noted that its scope of review on a case referred by it to the Commission was, in essence, the same as had theretofore been exercised by a statutory three-judge district court. At page 656, the Court particularly noted that questions of law were for the Court to decide and that it was not bound by decisions of the Commission thereon.

In the instant proceeding, the defendant and third-party plaintiff, LIRR, by its third-party complaint, seeks to have this Court enjoin, set aside and make null and void the orders of the ICC dated June 10, 1975, and February 3, 1976. In addition, by its answer to the initial complaint of GMC, the defendant and third-party plaintiff, LIRR, seeks to have this Court dismiss that complaint and permit LIRR to refuse to serve the private siding of GMC until such time as it executes LIRR's standard agreement for private sidings.

## POINT II

### THE COMMISSION ERRED IN HOLDING THAT LIRR MAY NOT LAWFULLY REQUIRE A SHIPPER TO BEAR THE FULL COST OF MAINTAINING A SWITCH CONNECTION PURSUANT TO SECTION 1(9) OF THE INTERSTATE COMMERCE ACT, AND ITS DECISIONS IMPROPERLY INTERPRETED THE PLAIN MEANING OF SECTION 1(9).

As pointed out in the Initial Decision of the Administrative Law Judge (at p. 6), a railroad may, in some if not most instances, discharge its common carrier obligation by delivering carload freight at public team tracks where the consignee can come and get it. Where a shipper has constructed, or wants to construct, a private sidetrack and meets certain conditions, a railroad has a duty to "construct, maintain and operate upon reasonable terms a switch connection with

any such . . . private sidetrack," or upon a shipper's complaint, may be required by the Commission to do so for "reasonable compensation." Section 1(9) of the Interstate Commerce Act, (49 U.S.C. 1(9)), in pertinent part, provides:

> "Any common carrier subject to the provisions of this part, upon application of any ... shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such... private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of same;.... If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application in writing by any such shipper..., such shipper...may make complaint to the Commission as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor...." (emphasis added)

Thus, where the three conditions are not present, a carrier has no duty to construct, maintain and operate a switch connection, but where the three conditions are shown to exist, the carrier may voluntarily do so "upon reasonable terms" or be compelled by the Commission to do so for "reasonable compensation."

As stated in the Initial Decision of the Administrative Law Judge, prior to 1954, LIRR's practice was to require industries to

bear the entire cost of maintaining private sidings and switch connections even though portions thereof were located on LIRR's property. In November 1954, that policy changed in order to meet the increasing competition of other modes of transportation and to attract additional industry to Long Island. Under the new policy, the industry paid the cost of constructing that portion of the sidetrack beyond the right-of-way line. Also, the LIRR was responsible for the maintenance cost of that portion of the sidetrack between the point of switch and the right-of-way line. In September 1970, due to soaring deficits from freight operations, LIRR returned to its pre-1954 policy which required industries to bear the entire cost of maintaining the private sidings and the switch connections. After that date, 169 sidetrack agreements were renegotiated to reflect the latest policy, before GMC refused to execute the same type of contract signed by other shippers.

LIRR may not, of course, unlawfully discriminate against, or in favor of, any individual shipper. If, contrary to its uniform policy, LIRR had agreed with GMC not to require it to absorb the maintenance costs, both LIRR and GMC might well have been prosecuted by the ICC's Bureau of Enforcement for giving and receiving unlawful rebates or concessions under the Elkins Act. (49 U.S.C. §41(1) et seq.) In the case at bar, however, the Commission is

requiring LIRR to engage in what is essentially an unlawful practice by giving GMC preferential treatment over the 169 other shippers & receivers who are bearing the maintenance costs of the switch connections.

The Commission has arrived at this anomalous situation by ignoring the words "upon reasonable terms" and "reasonable compensation" in Section 1(9) which qualify the carrier's duty and the Commission's power to compel the performance of such duty.

In his Initial Decision, the Administrative Law Judge found (at p. 9):

> "Upon consideration of all the evidence, the Administrative Law Judge finds that the Commission has the authority under the Administrative Procedure Act to determine the questions in issue in this proceeding; that respondent cannot lawfully require petitioner to bear the expense of maintaining a switch connection including sidetrackage located entirely on the right-of-way of respondent; that respondent cannot lawfully stop servicing the petitioner's facility where petitioner refuses to execute a sidetrack agreement obligating it to bear the expense of maintaining respondent's switch connection; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969."

Thus, the Administrative Law Judge found that even though GMC refused to execute the same type of sidetrack agreement signed

by 169 other shippers and receivers, LIRR could not require GMC to accept delivery at nearby team tracks and could not refuse to continue serving GMC's private siding, evidently without regard to the conditions in Section 1(9) as to practicability, safety and sufficiency of traffic. He also evidently found that a shipper or receiver may never lawfully be required to bear the expense of maintaining a switch connection located on railroad property which, of course, is ridiculous.

In its Decision and Order dated June 10, 1975, the Commission's three-member Division 3, with Commissioner O'Neal strongly dissenting, affirmed and adopted as its own the findings of the Administrative Law Judge, which are patently indefensible.

In the Report and Order Upon Reconsideration, dated February 3, 1976, Division 3, this time acting as an Appellate Division, in effect reversed the above-quoted erroneous findings of the Administrative Law Judge, but still came to the same ultimate result. Division 3 stated (351 I.C.C. at 698):

> "We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks."

Then, however, Division 3 went on to find (at p. 699):

> "We find that, on the present record, respondent may not lawfully impose the proposed

> maintenance charge upon petitioner and that, in the absence of a change in the practicability, safety, or sufficiency of traffic to petitioner's sidetrack, respondent may not terminate service over the involved switch connection."

Thus, Division 3 found that so long as the three conditions are met, LIRR has the duty to provide service over the involved switch connection -- which is true enough -- but must continue to do so without any compensation whatsoever -- which is obviously contrary to the intent of Section 1(9).

A correct explanation of the applicable law is contained in a recent Initial Decision by Administrative Law Judge Frederick M. Dolan, Jr., in Docket No. 36143, Allied Container Corporation v. Maine Central Railroad Company, served April 29, 1976. Judge Dolan stated:

> "It may be helpful initially to set forth a few basic principles. A carrier has no obligation to construct or maintain private sidetracks either under the act or at common law. Winters Mettalic Paint Co. v. Chicago, M. & St. P. Ry. Co., 16 I.C.C. 587, 589 (1909), Sioux City Term. Ry. Switching, 241 I.C.C. 53, 70 (1940). In the latter proceeding a carrier was found in violation of section 3(1) for constructing and maintaining private sidetracks for some industries but not others. See also Switching at Richmond, Va., 245 I.C.C. 293, 300 (1941) and Shaw Warehouse Co. v. Southern Ry. Co., 308 I.C.C. 609, 630 (1959)."

* * *

"Thus, once a private sidetrack has been constructed to connect with a railroad and application made the carrier must construct, maintain, and operate 'upon reasonable terms' a switch connection with the private sidetrack 'where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.' If the prerequisite statutory conditions exist, the connection must be made whether desired by the carrier or not. Imperial Wheel Co. v. St. L., I. M. & S. Ry. Co., 20 I. C. C. 56, 59 (1910).

"Section 1(9) also provides that for constructing, maintaining and operating a switch connection a carrier is entitled to 'reasonable terms' and in another sentence 'reasonable compensation.' The two sentences comprising section 1(9) complement each other the first setting forth the conditions upon which the carrier's duty exist. The second gives the Commission authority to order the carrier to fulfill that duty if it shall fail to install and operate any such switch or connection when all the requisite conditions are present. The Commission is also empowered to determine as to the safety and practicability justification and reasonable compensation in regard to the switch connection. 'Justification' refers to whether a shipper will furnish sufficient business to justify the construction and maintenance of the switch connection. 'Reasonable compensation' refers to the duty of the carrier to construct, maintain, and operate the switch connection 'upon reasonable terms.' 'Reasonable compensation' was determined in, for example, M'rae Terminal Ry. v. Southern Ry. Co., 12 I. C. C. 545, 547 (1907) where the Commission stated: 'We are of the opinion that $150 would be compensation for installing the switch and sufficient track so that a car might clear as indicated by the superintendent, of maintaining the same for two years,

> and of paying whatever slight damage may be done to the Seaboard right of way. We are further of the opinion that this connection is entirely practicable; that it does not add much to the hazard of operating the Seaboard Air Line Railway, and that the business in sight is sufficient to justify the connection.' See Virginia Coal & Fuel Co. v. N. & W. Ry. Co., 55 I.C.C. 61, 64 (1919)"

By ignoring the words "upon reasonable terms" and "reasonable compensation," the Commission's Division 3 clearly and unquestionably misinterpreted the provisions of Section 1(9).

In addition, the Commission has misconstrued and failed to perform its functions under Section 1(9), while deciding the controversy on the merits under the provisions of that section. Where a carrier refuses to operate a switch connection under any terms or cannot agree with the shipper upon "reasonable terms" and the shipper complains, the Commission's duty under Section 1(9) is to "determine as to the safety and practicability thereof and justification and reasonable compensation therefor." Division 3 made none of the statutory determinations.

As to practicability, safety and sufficiency of traffic, the Commission made no findings, merely assuming that LIRR must have been satisfied since it did in fact construct the sidetrack. (351 I.C.C. at 696) As to "reasonable compensation," the Commission engages

in some double talk as to establishing a separate maintenance charge with a reduction in the line-haul rates or in addition to the line-haul rates, but finally finds no such charge may be imposed in the absence of a change in the conditions as to practicability, safety and sufficiency of traffic. In effect, Division 3 concludes that "no compensation" is "reasonable compensation."

Under Section 1(9), the Commission had to find either that LIRR had or did not have a duty to serve GMC's private sidetrack, and either determine "reasonable compensation" for the performance of the duty or allow LIRR to discontinue serving it. In doing neither, the Commission clearly misinterpreted and misconstrued the provisions of Section 1(9).

## POINT III

### A CARRIER IS NOT REQUIRED TO RECOUP THE COST OF MAINTAINING A SWITCH CONNECTION FROM ITS LINE-HAUL RATE.

In its Decision and Order Upon Reconsideration, Division 3 stated "the task of delivering freight is an integral [ part ] of the transportation obligation and, therefore, as a general rule, the delivery of freight is a service performed under a carrier's line-haul rate. Correspondently, the expenses attributable to delivering freight should

generally be met from a carrier's line-haul revenues." (351 I. C. C. at 696)

While a carrier has a duty to deliver freight, this obligation can, of course, be discharged by delivery to nearby team tracks and, in the absence of agreed-upon "reasonable terms" or "reasonable compensation" determined by the Commission, delivery is not required on private sidings.

Moreover, Division 3's notion that the costs of maintaining switch connections are covered by LIRR's line-haul revenues is ridiculous in light of the evidence presented by LIRR. In 1972, for example, LIRR had total freight revenues of about $9.2 million, total freight operating expenses of about $20.7 million, and a net loss from freight operations of about $11.5 million. In other words, LIRR's freight revenues covered less than half its freight expenses. The freight revenues of $9.2 million failed even to cover the "transportation" expense of $10.2 million, let alone covering the "maintenance of way" expense of $2.4 million and the other freight expenses.

So long as LIRR's freight operations were incurring only relatively small freight deficits, LIRR absorbed the costs of maintaining switch connections, rather than requiring the shippers to do so. But as Commissioner O'Neal pointed out in his dissenting opinion,

when a carrier chooses to recover its cost of maintaining switch connections from its line-haul rate, it is erroneous to deduce from this that a carrier is wedded to this form of compensation, since "the carrier may, under the provisions of Section 1(9), institute a separate charge for the maintenance of a switch connection and adjacent spur, subject to a determination by the Commission as to the reasonableness of the charge."

The Commission recently held that rail carriers could institute a new, separate charge for the in-transit inspections which had previously been performed as part of the line-haul rate. Inspection in Transit, Grain and Grain Products, 349 I. C. C. 89. The institution of the separate charge resulted in a reduction in services available under the line-haul rate and was regarded functionally as resulting in increased rates.

As mentioned above, in Docket No. 36143, Allied Container Corporation v. Maine Central Railroad Company, decided April 22, 1976, the Administrative Law Judge recently recognized the right of the carrier to recover its cost for maintenance of a switch connection by means of a contractual arrangement requiring an industry to bear the full maintenance cost for such connection. In that case it was the customary practice of the carrier for the past 50 years to require

industries to bear the cost of maintenance of private sidetracks including switch connections whether or not they were located upon railroad property.

In the case at bar, the ICC noted that LIRR absorbed the cost of maintaining the GMC switch connection until the present controversy arose. However, as pointed out by the Administrative Law Judge in the Initial Decision, prior to 1954, it was the customary practice of LIRR to require industries with private sidings to bear the entire cost of maintenance of switch connections located upon railroad property. In 1954, because of growing competition from other modes of carriage and the desire to attract additional industry to the Long Island area, this practice was changed and LIRR undertook for the first time to absorb the cost of maintaining switch connections and portions of private siding trackage located upon LIRR property. In 1954, LIRR had a profit of $2.6 million from freight operations. By the end of 1970, LIRR's freight operations were reporting a deficit of $9.6 million. At that point, LIRR reversed its 1954 policy of absorbing maintenance costs and began to renegotiate all outstanding sidetrack agreements to have them conform to its earlier policy of requiring an industry to bear the full cost of installation and maintenance of a switch connection. New industries locating on LIRR's line were also required

to bear these maintenance and installation costs.

In the Report and Order Upon Reconsideration, Division 3 states (351 I.C.C. at 697-698):

> "The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charge."

With the record showing that LIRR's revenues from the line-haul rates cover only about half of the freight expense and that the proposed sidetrack agreements provide for recovery of only the costs of maintaining the switch connections, the above-quoted statements of Division 3 are obviously directly contrary to the evidence.

So that, even if the payments under the sidetrack agreements were to be regarded as an increase in the line-haul rates, such an increase by LIRR is reasonable and clearly justified.

## POINT IV

### SEPARATE MAINTENANCE CHARGES ARE REASONABLE AND ARE NONDISCRIMINATORY NONPREFERENTIAL AND NONPREJUDICIAL

Rail rates, in general, are published from and to stations regardless of whether delivery is to be effected on a public delivery track or a private siding. The unrefuted evidence of record shows

that in the case of GMC's private siding at Bethpage, the operational cost to the LIRR is substantially higher than that of serving the closely adjacent public team track facilities, and GMC admits the substantial benefit to it of receiving this preferential service.

Commissioner O'Neal, in his dissenting opinion, succinctly stated why the imposition of a separate maintenance charge for switch connections with private sidetracks represents not only good law but also good economics and policy:

> "The situation of the Long Island illustrates why the imposition of a separate maintenance charge represents not only good law but also good economics and policy. The record shows that the switch connection costs $2,908 per year to maintain and that switching cars into the General Motors' private siding is more costly and time consuming than switching to the nearest public team track. Those costs are now apportioned among all the rates charged by the Long Island Railroad (or perhaps all the rates charged on auto parts). The shippers who do not have the benefit of private sidings must help pay for those who do. The L.I.R.R. proposal constitutes an attempt to impose charges which reflect the costs of the services on which they are assessed."

In Docket No. 36143, the Administrative Law Judge also recognized that a separate maintenance charge for switch connections leading to private sidetracks had a nondiscriminatory effect and was a sound economic policy when he stated:

"To compel defendant against its established custom to absorb the right-of-way lead and switch costs for private sidings and to allocate them to its general costs of doing business would inevitably result in the necessity of increasing its line-haul transportation rates which would be borne by all railroad shippers and receivers on its system who, not being authorized to load or unload at such sidings, would not obtain a direct benefit therefrom.

"Any decision altering the terms of the March 8, 1974, standard agreement would immediately advantage complainant and discriminate against the 190 other industries who are now served by private sidings both on as well as extending off defendant's rights-of-way. Such a decision would be particularly discriminatory in respect to those shippers who have established private sidings wholly located within defendant's right-of-way and who could not invoke section 1(9) since there is no "private sidetrack" with which to connect. Compare Schlicher v. Director General, 62 I. C. C. 181 (1922).

"At a time when railroads throughout this nation are faced with the burden of sustaining excessive fixed capital assets with limited liquid assets, it would seem inappropriate to require a railroad to take on the additional burden of financing the installation and maintenance of a right-of-way facility, a switch connection, for the primary if not sole benefit of a single shipper, especially when that railroad customarily and regularly for half a century has placed that responsibility directly with the immediate beneficiaries of such a facility." Allied Container Corp. v. Maine Central Railroad Company, Docket No. 36143, decided August 22, 1976, at p. 8.

Based on the 585 cars handled at GMC's private siding in

1972, the estimated annual maintenance cost of $3,267 comes out to less than $6 per car. In 1972, when LIRR handled some 65,000 cars, its freight deficit exceeded $11 million, or more than $150 per car. Thus, the compensation for maintenance of the switch connections would eliminate only a small part of the deficit per carload of freight. With some 270 switch connections at an average annual maintenance cost of $2,908, the total additional revenue to LIRR would be less than 10 percent of its 1972 freight deficit. Since the sidetrack agreements provide for the reimbursement of only the actual maintenance costs and would result in eliminating only a small part of LIRR's freight deficit, it would be impossible for anyone to find such a maintenance charge anything but reasonable.

Payment by GMC of the maintenance costs would not only be nondiscriminatory and nonprejudicial, but would clearly appear to be necessary in order to avoid unlawful preference under Section 3(1) of the Interstate Commerce Act and possibly unlawful rebates or concessions under the Elkins Act. LIRR has tried to treat all of its shippers and receivers fairly and evenly. After the change in policy with regard to maintenance cost of switch connections, LIRR successfully renegotiated sidetrack agreements with 169 of its patrons before GMC decided to balk and throw its weight around. Thus, the other

169 shippers and receivers are now paying for the maintenance costs of the switch connections necessary to serve their private sidings, while GMC is receiving delivery at its Bethpage private siding without absorbing the maintenance costs.

The proposed maintenance charge which GMC refuses to pay is clearly reasonable, nondiscriminatory, nonpreferential and non-prejudicial, and Division 3 clearly erred in not so finding.

## POINT V

### THE COMMISSION ERRED IN FINDING THAT THE RECORD CONTAINS NO BASIS FOR CONCLUDING THAT THE MAINTENANCE CHARGE IS REASONABLE AND THAT LIRR IS NOT FULLY COMPENSATED FOR SUCH EXPENSE IN THE LINE-HAUL RATES

At page 697 of its February 3, 1976, Decision and Order Upon Reconsideration, the Commission, Division 3, states:

> "Moreover, maintenance costs are usually changeable to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection. An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges."

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF,
THE LONG ISLAND RAIL ROAD COMPANY

As the record clearly shows and as has already been indicated above, for a number of years the LIRR's freight service has been operating at a substantial deficit totaling millions of dollars a year. The record discloses that the standard sidetrack agreement offered to GMC by LIRR calls for the payment of actual maintenance costs for the switch connection, in this instance approximately $3,267 per year. With about 270 private sidetracks located along its rights of way, the maximum reimbursement of costs to be derived by LIRR from these private siding contracts is less than $1 million per year, an amount obviously insufficient to offset the deficits of $11 million or more annually incurred from the operation of its freight service.

Moreover, the Commission itself has recognized the uneven and inequitable effects of the current divisional arrangements, so that even if the LIRR were to impose a specific increase in the line-haul rates or, in the alternative, impose a specific surcharge to the line-haul rates to cover these costs, it would still be insufficiently reimbursed since the amount raised by such a rate increase would be subject to divisions and the LIRR would receive, at most, one-third of this amount. Clearly, until such time as the Commission is able to correct the gross inequities of the divisional arrangements covering

the railroad industry, which was one of the primary causes leading to the bankruptcy of the railroads in the northeast, this Court must conclude that the Commission's rationale in this regard at its most charitable constitutes sheer sophistry.

It is not unreasonable for the LIRR to seek reimbursement for such costs and where the proposed contract seeks to recover only the amount actually expended on such maintenance charges, it is impossible to understand in light of LIRR's deficits how the Commission can say that the LIRR has not shown the reasonableness of the charge.

## CONCLUSION

It is respectfully submitted that the Commission's Division 3, in both the Decisions of June 10, 1975, and February 3, 1976, issued in Docket No. 35790, has committed error of law and otherwise acted arbitrarily and capriciously to the prejudice of the third-party plaintiff, The Long Island Rail Road Company, and that the aforesaid Orders should be set aside, vacated and made null and void by this Court.

It is also respectfully submitted that until such time as the plaintiff, General Motors Corporation, signs and executes the standard sidetrack agreement proffered it by defendant and third-party plaintiff, The Long Island Rail Road Company, that the aforesaid Long Island Rail Road Company should be permitted to make delivery at nearby

team tracks and to refuse to further service the private siding of General Motors Corporation, and for such other and further relief as may seem just and proper in the premises.

Respectfully submitted,

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JOINT BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>THE LONG ISLAND RAILROAD COMPANY,<br><br>Defendant. | Civil Action No.<br><br>72-C-1549 |
| THE LONG ISLAND RAILROAD COMPANY,<br><br>Third-Party Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,<br><br>Third-Party Defendants. | |

JOINT BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

STATEMENT OF THE CASE

This is an action to set aside and annul orders of the Interstate Commerce Commission ("Commission") entered in Docket No. 35790, Joint Petition For Declaratory Order - Private Sidetrack - General Motors Corporation and the Long Island Rail Road Company, 351 I.C.C. 691 (1976). This case was initiated as an action brought in this Court on November 14, 1972, by complaint filed by the General Motors Corporation

("GM") against the Long Island Rail Road ("LIRR"). GM obtained a temporary restraining order on December 7, 1972, against LIRR, enjoining the railroad from halting service to GM's Bethpage, New York warehouse and distribution facility. The temporary restraining order was to remain in effect pending resolution by the Commission of the rights and duties of LIRR and GM involved in a certain switch connection at the Bethpage site.

By order served March 17, 1976, the Commission decided the switch maintenance dispute in favor of GM. By third-party complaint of April 1, 1976, the Commission was joined as a party for a judicial review of its decision pursuant to 28 U.S.C. §1336(b). At a pretrial conference on May 7, 1976, this Court ordered initial concurrent briefs by the parties. The National Industrial Traffic League ("NITL") has intervened as a third-party defendant.

## BACKGROUND

This case has its genesis in 1965 in the construction of a sidetrack by GM for service to its Bethpage facility. The prevailing policy of LIRR at that time was to pay for construction of the sidetrack from the switch point to the boundary of its right-of-way. An additional policy of LIRR at that time was to pay for the maintenance of that part of

the sidetrack for which it had paid construction costs. These policies appeared to have been a drastic change from that of LIRR prior to 1954, when the railroad required shippers to bear the entire cost of maintaining private sidings and switch connections even though portions thereof were located on railroad property. Subsequent to 1954, the LIRR established these new policies in order to meet increased motor carrier competition. Since 1965, the LIRR has served GM under its line haul rates through the subject switch connection, maintain by the railroad, to the private sidetrack maintained by GM.

Due to soaring freight deficits, the LIRR in about 1970 reverted to its pre-1954 policy of requiring industries to absorb the entire costs of maintaining the switch connections and private sidetracks. In 1972, the LIRR submitted a track agreement to GM which would require that shipper to pay the entire maintenance costs of the switch and sidetrack. Upon GM's refusal to execute this agreement, the LIRR threatened to terminate operations at the switch connection, which would require GM to utilize motor carriers for the movement of its commodities between its Bethpage facility and LIRR's public team tracks at Hicksville, New York. Thereupon, GM sought and received a temporary restraining order from this

Court prohibiting LIRR from terminating service pending a decision of the Commission on the rights and duties of the parties.

COMMISSION PROCEEDINGS

As part of the temporary restraining order entered by this Court on December 7, 1972, GM and LIRR were directed to submit the matter in dispute to the Commission. On February 6, 1973, GM and LIRR filed with the Commission a Joint Petition for Declaratory Order. The case was handled by modified procedure, upon written submissions of the parties, with NITL intervening in support of GM.

On May 21, 1974, the initial decision was rendered by the Administrative Law Judge in which he concluded that (1) the switch connection is part of the railroad's overall transportation service and must be maintained by line haul revenues, (2) the present line haul rates include delivery to GM's sidetrack, (3) any new maintenance charge would be an increase not lawfully published in the railroad's tariff, and (4) as long as GM furnished sufficient business LIRR was obligated to operate and maintain the switch connection. Thereafter, the administrative law judge found that under these circumstances LIRR could neither impose the new maintenance charge nor terminate service to GM. By an order served June 17, 1975, Division 3 of the Commission adopted

and affirmed the statement of the facts, conclusions and findings of the Administrative Law Judge and discontinued the proceedings.

Upon reconsideration, in an opinion of some length served March 17, 1976, the Commission's Division 3 elaborated upon its earlier decision. The decision of the Commission notes that LIRR in this particular proceeding has not established that line haul rates "do not fully compensate it for the maintenance of the switch connection at issue." In addition, it was found that LIRR had not established the reasonableness of the additional maintenance charges. 351 I.C.C. at 698-99. The opinion also noted that LIRR had neither alleged nor proved any adverse change in the practibility, safety or sufficiency of business to and from GM's Bethpage sidetrack. However, the Commission was careful to note that LIRR was not forever precluded from establishing separate maintenance charges for switch connections to private sidetracks on a properly developed record.

> "Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that an existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial."
> 351 I.C.C. at 698-99.

# JOINT BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

## STATUTE PRIMARILY INVOLVED

The case at bar involves primarily the construction of Section 1(9) of the Interstate Commerce Act, 49 U.S.C. §1(9), which reads:

> "Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate under reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than order for the payment of money."

## ISSUES PRESENTED

1. Whether the Commission has authority to review and determine the reasonableness of the terms of an

agreement requiring shippers to pay the costs of maintenance of switch connections voluntarily built by a railroad?

2. Whether the Commission properly applied applicable standards for determining the reasonableness of switch maintenance charges?

3. Whether the decision of the Commission is based upon adequate findings, supported by substantial evidence and not irrational?

## ARGUMENT

### I.

### THE SCOPE OF JUDICIAL REVIEW APPLICABLE TO ORDERS OF THE INTERSTATE COMMERCE COMMISSION IS LIMITED.

It is a fundamental principle of administrative law that the scope of judicial review of orders of agencies such as the Commission is limited. Courts will sustain orders of an independent regulatory agency if they are made within its statutory power and are based upon appropriate findings which in turn are supported by substantial evidence. Illinois C. R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 66, 69 (1966); Consolo v. Federal Maritime Comm'n., 383 U.S. 607, 619-21 (1966).[1/]

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1/ See also, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951); United States v. Pierce Auto Freight Lines, Inc. 327 U.S. 515, 535 (1946); Virginia Ry. Co. v. United States, 272 U.S. 658, 663 (1926).

JOINT BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

Section 10(e) of the APA, 5 U.S.C. §706, sets forth the standard, herein pertinent, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
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> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence . . .

Each of the above subsections of section 706(2) provides a separate standard for review. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974).

Under Section 706(2)(E) the court is limited to the determination of whether or not the agency's findings are supported by substantial evidence. Illinois Central R. R. v. Norfolk & Western Ry., supra; Universal Camera Corp. v. N.L.R.B., supra. The term "substantial evidence" has been defined as adequate to support a conclusion," Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938), and as "enough to justify, if the trial were to a jury, a refusal

to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Illinois Central R.R. v. Norfolk & Western Ry., supra, 385 U.S. 66; N.L.R.B. v. Columbiana Enameling & Stamping Co., 306 U.S. 292, 300 (1939). The Supreme Court has gone on to state that this standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Consolo v. Federal Maritime Comm'n., supra, 383 U.S. at 619-20. N.L.R.B. v. Nevada Consolidated Copper Co., 316 U.S. 105, 106 (1942).

The weight to be given administrative findings is well settled. Interstate Commerce Commission v. Union Pacific R.R., 222 U.S. 541, 547 (1911). The reviewing court should not consider the expedience or wisdom of the order, or whether it would have made a similar holding on like testimony. United States v. Pierce Auto Freight Lines, Inc., supra, 327 U.S. at 535-36. It is not the court's province to inquire into the method of the Commission's reasoning, the wisdom of its decision, or the consistency of its conclusions with those reached in similar cases. Georgia Commission v. United States, 283 U.S. 765, 777 (1931). Consideration of the weight and value of the evidence and the inferences to

be drawn therefrom are matters for the Commission alone. New England Division Cases, 261 U.S. 184, 204 (1922). As has been pointedly observed in Morgan DriveAway, Inc. v. United States, 268 F. Supp. 886, 890 (N.D. Ind. 1967), citing with approval Moon v. Celebrezze, 340 F.2d 926 (7th Cir. 1965):

> When the record as a whole will support equivocal but reasonable determinations, neither the district court nor this court may make a redetermination to comport with our own views of the case. If we were to do so, we would be assuming the role of a superagency rather than providing a check against unreasonable and arbitrary results. [Citation omitted].

See also Consolo v. Federal Maritime Comm'n., supra, 383 U.S. at 620-21.

If substantial evidence supports the Commission's findings, they may not be set aside unless "arbitrary and capricious." 5 U.S.C. §706(2)(A). With respect to this standard for review of agency action, the Supreme Court recently explained in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra, 419 U.S. at 285-86:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." [Citation omitted]. The agency must articulate a "rational connection between

> the facts found and the choice made." [Citation omitted]. While we may not supply a reasoned basis for the agency's action that the agency itself has not given, [Citation omitted], we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. [Citation omitted.]

Indeed, the Commission's decision must be "so irrational as to constitute the decision arbitrary and capricious." Dunlop v. Bachowski, 421 U.S. 560, 572-73 (1975). As the Court of Appeals for the Eighth Circuit recently stated, "It is rare that a Commission order is not based on relevant factors or that the exercise of its expertise can be termed such an abuse of discretion as to require reversal by the courts." Warren Transport, Inc. v. United States, 525 F.2d 148, 151 (8th Cir. 1975). These standards are applicable with equal force to judicial review proceeding pursuant to 28 U.S.C. §1336(b). Keller Industries, Inc. v. United States, 449 F.2d 163 (5th Cir. 1971); Seaboard Airline R. Co. v. United States, 387 F.2d 651 (Ct. Cl. 1967).

Finally, there is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 512 (1943). See also Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968); Artus Trucking Co. v. Interstate Commerce Commission, 377 F. Supp. 1224, 1231 (E.D. N.Y. 1974).

## II.

## THE COMMISSION HAS AUTHORITY TO REVIEW AND DETERMINE THE REASONABLENESS OF THE TERMS OF A PROPOSED CONTRACT REQUIRING SHIPPERS TO PAY COSTS OF MAINTENANCE OF A SWITCH CONNECTION VOLUNTARILY BUILT BY A RAILROAD.

Section 1(9) of the Interstate Commerce Act (49 U.S.C. §1(9)) embodies a broad statutory scheme for the protection of shippers' right to access from private sidetracks to the common carrier rail lines, providing a mechanism for insuring construction and maintenance of switch connections upon a proper showing as set out in the statute. 2/ The relevant part of the statute requires the railroads to "construct, maintain, and operate upon reasonable terms a switch connection." The provision goes on to state that if the railroad fails to "operate any such switch or connection as aforesaid" [i.e., "upon reasonable terms"] the Commission may determine, among other things, "reasonable compensation." It is submitted, therefore, that the statute on its face confers broad discretionary and supervisory powers on the Commission to monitor and ensure fair dealing between the railroad and the shipper which must rely on a particular carrier, which often has exclusive control of access of the shipper to the rail mode of transportation.

A review of the legislative history of this section yields nothing to the contrary. 3/

In its final report and order, the Commission deals at length with this issue of its authority to review the instant proposed agreement.

> "The purpose of Section 1(9) can be defeated just as well by failure to operate a switch connection on reasonable terms as by refusal to construct in the first instance. ... it is inconsistent to hold that the Commission can prescribe reasonable compensation for construction when it orders institution, but cannot review the reasonableness of such compensation if voluntarily agreed to by the parties." 351 I.C.C. at 697.

In exerting its authority, the Commission specifically declined to follow its former opinion in Ziegler Bros. v. Southern Rwy. Co., 157 I.C.C. 660 (1929). 4/ In Ziegler the Commission had noted that Section 1(9) "does not authorize us to determine what a reasonable charge would be for a switch connection that has been instituted and in operation." 157 I.C.C. at 662. This position the Commission specifically disclaimed in the instant case as "unduly broad," and decided not to follow. 351 I.C.C. at 697. This, of course, the Commission can clearly do, not being bound by the normal

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2/ This criterion will be discussed hereinafter.

3/ Section 1(9) was enacted as part of the Hepburn Act (H.R. 12987) of 1906. See generally, H. Rep. No. 4659, p. 5, June 2, 1906; H. Rep. No. 5003, pp. 2, 4, June 23, 1906; H. Rep. No. 5076, pp. 5-6, June 28, 1906.

4/ See also, Merchants Refrigeration Co. v. New York Central R. Co., 238 I.C.C. 599 (1940).

constraints of the judicial doctrine of precedent. American Trucking Ass'n., Inc. v. Atchison T. & S.F. R. Co., 387 U.S. 397, 415-16 (1967); Atchison T. & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973). Indeed, as we have demonstrated above, the decision of the Commission in the case at bar correctly recognizes that the statute in question grants broad supervisory powers on the Commission over the construction and maintenance of switch connections.

## III.

## THE COMMISSION PROPERLY APPLIED THE APPLICABLE STANDARD FOR DETERMINING REASONABLENESS OF SWITCH MAINTENANCE CHARGES

Section 1(9) of the Act clearly states that a railroad "shall construct, maintain, and operate upon reasonable terms a switch connection...where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." These criteria, plain on the face of the statute, were recognized and utilized by the Commission in the instant case. 351 I.C.C. at 696. Indeed, these standards have been consistently used by the Commission [5/]

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5/ See, K. Dering Coal Co. v. Cleveland, C., C. & St. L. Rwy. Co., 96 I.C.C. 143 (1925 ), sustained sub. nom. Cleveland, C., C. & St. L. Rwy. Co. v. United States, 275 U.S. 404 (1928); Alexander King Stone Co. v. Chicago, I. & L. Ry. Co., 160 I.C.C. 245 (1929); City of Sturgen Bay v. Ann Arbor R. Co., 274 I.C.C. 773 (1949).

and long recognized by the courts. See Hocking Valley R. Co. v. New York Coal Co., 217 F. 727, 733 (6th Cir. 1914). As noted by the Commission, LIRR, in voluntarily constructing and maintaining the instant switch connection, must have been satisfied that the above criteria were met, and that maintenance had continued for seven years "upon reasonable terms." 351 I.C.C. at 694.

In refusing to allow the LIRR to transfer maintenance charges to GM at this time and under the facts of this record, the Commission noted that the obligation of delivering freight to a shipper under just and reasonable practices prescribed by Section 1(6) of the Act, 49 U.S.C. §1(6), is a service to be performed under a line-haul rate, recoverable from the carrier's line-haul revenues. 351 I.C.C. at 696, citing Propriety of Operating Practices - Packing Sheds, 246 I.C.C. 273, 283 (1941) and Split Deliveries and Drayage Allowances at New York, 245 I.C.C. 40, 41 (1941).[6/] As noted by the Commission in this case, the switch connection at issue was paid for and maintained from LIRR's line haul revenues. "An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections." 351 I.C.C. at 697. Having

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6/ See generally, Alton R. Co. v. Illinois Commerce Commission, 305 U.S. 348, 355 (1939).

already placed the switch maintenance cost in the rate base, and having failed to either allege or show any change in the criteria of Section 1(9) for construction and maintenance of the switch (351 I.C.C. at 696), the LIRR is submittedly precluded from shifting the cost of maintenance to GM under the facts now of record. But again, we hasten to point out that LIRR is free to carry its burden at any time "upon establishing a reduction in line-haul rates to correspond with the resulting maintenance charges, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial." 351 I.C.C. at 698-99. The factual basis for these showings have not been made by LIRR in this particular record.

In addition to these factual matters which have not been established in this record, it may be argued that the absorption of maintenance charges is improperly preferential to large shippers who have private sidetracks, as opposed to smaller shippers who use the public team tracks for delivery and shipment of their commodities. The Commission properly and decisively destroyed this argument in its report and order, noting that although the existence of separate delivery facilities does constitute different levels of service,

they do not constitute unjust discrimination nor undue preference or prejudice because the levels of service relate and "correspond to the volume of traffic generated by a particular facility." 351 I.C.C. at 698. Again, the volume of business is precisely the criterion mandated by Section 1(9). See Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973).

## IV.

## THERE IS NO DISPUTE AS TO THE SUBSTANTIALITY OF THE EVIDENCE SUPPORTING THE COMMISSION'S FINDINGS.

Although the parties agreed at the pre-trial conference on May 7, 1976, that no issue of substantiality of the evidence was present in this case, the Government will set out below, for the information of the Court, some examples of findings for which substantial evidence exists of record.

A key factual finding of the Commission was that maintenance costs attributable to switch connections are an expense included in LIRR's general line-haul rate base. Substantial evidence to that effect was presented by GM to the Commission in their opening argument (See verified statement, Appendix C to that argument, of Sidney M. Carnahan).

A further factual finding supported by substantial evidence of record is that the GM sidetrack has not suffered a decline in business---relating to the sufficiency of business standard of Section 1(9). The verified statement of William Burke, Appendix A to GM's opening statement, shows the weekly volume of at least 15 cars per week being delivered to the Bethpage facility. In another verified statement, attached as Appendix A to GM's rebuttal argument to the Commission, Mr. Burke breaks down these figures even more to show a constant if not increasing volume of traffic. (See also, Mr. Carnahan's second verified statement, attached as Appendix B to GM's rebuttal argument).

These are but several examples of the breadth of the evidence which supports the Commission's findings. Again, as indicated by LIRR at the pre-trial conference, substantiality of the evidence is not at issue. However, these facts, or rather the absence of proof by LIRR, show that the Commission's decision that the present record does not allow an adjudication of the railroad's ultimate claim of the necessity of separate maintenance charges is not irrational. Upon a properly pleaded record, the LIRR may event 1ly prevail, and it is not forclosed by the instant decision from doing so.

JOINT BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

## CONCLUSION

This case presents a simple matter of the failure of proof on the part of LIRR. If the railroad presents sufficient evidence to establish that its line haul rates do not fully compensate it for the maintenance of the instant switch and that those additional charges are reasonable under the proper criteria, 351 I.C.C. at 698-99, the LIRR may prevail. Also, it is beyond question that the Commission has sufficiently broad supervisory power in this area to pass on the reasonableness of a switch maintenance agreement. Any other reading of the plain words of the statute leads to inconsistent and illogical results. See 151 I.C.C. at 697.

For these and all of the reasons stated herein, LIRR's complaint is devoid of merit and should be summarily dismissed.

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BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION<br><br>Plaintiff<br><br>v.<br><br>LONG ISLAND RAIL ROAD COMPANY<br><br>Defendant and Third-Party Plaintiff<br><br>v.<br><br>UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION<br><br>Third-Party Defendants<br><br>THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE<br><br>Intervening Third-Party Defendant | Civil Action No. 72-C-1549 |

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Pursuant to the pretrial ruling of the Court entered on May 7, 1976, this Brief is submitted on behalf of The National Industrial Traffic League (hereafter sometimes referred to as the League). The League was permitted to intervene as a third-party defendant by order of the Court entered May 18, 1976.

# BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

## STATEMENT OF THE CASE

The League concurs with the Statement of the Case, the Statement of Facts, the description of Proceedings Before The Interstate Commerce Commission and the Statutes Involved contained in the brief of plaintiff General Motors Corporation (GM) except to note the League's intervention in these Court proceedings.

## QUESTIONS PRESENTED

1. Whether and to what extent the Court may substitute its interpretation of Section 1(9) of the Interstate Commerce Act for that of the Commission?

2. Whether the Commission has properly interpreted Section 1(9)?

## ARGUMENT

The only issue raised by the Long Island in its third-party complaint is whether or not the Commission has properly interpreted Section 1(9) of the Interstate Commerce Act. (Complaint, paragraph 17) However, there is a threshold question as to whether and to what extent this Court may substitute its interpretation of the statute for that of the administrative agency to which Congress has delegated the function of administering it.

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

This matter was referred to the Commission because of the requirements of the doctrine of primary administrative jurisdiction. The rationale for the doctrine can be found in Mr. Justice Frankfurter's cogent analysis in Far East Conference v. United States, 342 U.S. 570, 574-75 (1952):

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.
>
> "It is significant that this mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction. 'The pioneer work of Chief Justice White' in Texas & Pacific R. Co. v. Abilene Cotton Oil Co. 204 US 426, as his successor characterized it, 257 US xxvi, was one of those creative judicial labors whereby modern administrative law is being developed as part of our traditional system of law. In this case we are merely applying the philosophy which was put in memorable words by Mr. Justice (as he then was) Stone:

> '. . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.' United States v. Morgan, 307 US 183, 191."

This rationale was cited by Mr. Justice Brennan in Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 497 (1958), and then he added, at page 498:

> "It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare Denver Union Stock Yard Co. v. Producers Livestock Marketing Asso. 356 US 282. It is recognized that the courts, while retaining the final authority to expound the statute, should

> avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation."

Thus, in this case, while the Court is bound by the factual findings made by the Commission, it does have the authority to review the Commission's interpretation of the statute at issue. Cf. 3 Davis, Administrative Law 45 (1958).

In this case, however, the Court need not substitute its interpretation of the statute, as it can confidently rely on the interpretation reached by the agency after exercising its specialized competence in determining and considering the relevant facts. The "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." Investment Company Institute v. Camp, 401 U.S. 617, 626 (1971).

An objective analysis of the Commission's decision under review clearly shows the reasonableness of its interpretation of Section 1(9). The agency's ruling reflects a consideration of the facts and the statutory language. It also reflects a policy decision which should not be disturbed by this Court unless it is clearly beyond the scope of the Commission's

statutory authority. See 5 U.S.C. Sec. 706(2)(C) and Atchison T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 805-807 (1973). Since the Commission's order is not clearly erroneous, it must be upheld by this Court.

## CONCLUSION

There is no basis for overturning the Commission's decision under review. The third-party complaint of the defendant Long Island Rail Road Co. should be dismissed with prejudice.

Dated at Washington, D.C. this 30th day of July, 1976.

Respectfully submitted,

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REPLY BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION.

UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF NEW YORK

GENERAL MOTORS CORPORATION
A Corporation of the State
of Delaware

Plaintiff

v.

THE LONG ISLAND RAIL ROAD
COMPANY
A Corporation of the State
of New York

Defendant

72 C 1549

THE LONG ISLAND RAIL ROAD
COMPANY

Third Party Plaintiff

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Third Party Defendants

/

REPLY BRIEF OF PLAINTIFF
GENERAL MOTORS CORPORATION

Comes now General Motors Corporation (hereinafter sometimes referred to as "General Motors" or "GM"), by its attorneys Benson T. Buck and Leonard F. Charla, and submits

REPLY BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

this its Reply Brief in the captioned proceeding. The purpose of this Brief is to present to the Court rebuttal of certain points made in the Brief of Defendant, Long Island Rail Road Company (hereinafter sometimes referred to as "Long Island" or "LIRR"), and to direct the attention of the Court to the status of certain cases cited by Defendant in its Brief.

## THE COMMISSION DID NOT ERR IN ITS INTERPRETATION OF SECTION 1(9) OF THE INTERSTATE COMMERCE ACT

Defendant argues erroneously in Point II in its Brief that the Interstate Commerce Commission (hereinafter sometimes referred to as "the Commission" or "I.C.C."), was wrong in holding the LIRR may not lawfully require shipper to bear full costs of maintaining a switch connection pursuant to Section 1(9) of the Interstate Commerce Act (49 U.S.C.A. §1(9)), and that the Commission's Decision improperly interprets the plain meaning of §1(9). The LIRR's argument falls, however, when one reads the Commission's Decision:

> ". . . the plain meaning of the statute suggests that a carrier's obligation with regard to switch connections is qualified by the following three conditions: that the switch connection is reasonably practicable; that the switch connection can be installed and operated with safety;

> and that the switch connection will furnish sufficient business to justify its construction and maintenance."
> (351 I.C.C. 691 at p. 696)

The three conditions were met beyond all doubt and this has not been disputed on the record. At no point did the LIRR allege the connection is impracticable; the LIRR has not alleged the switch connection is unsafe; and General Motors has established conclusively that sufficient business is furnished over the switch connection to justify the connection's existence, which fact the LIRR has not denied. For the Long Island to allege otherwise is contrary to the established facts.

## NO ELKINS ACT QUESTION IS INVOLVED

At the present time, the Long Island has about 270 private sidetracks along its right-of-way (Defendant's Brief, p. 24). Only 169 of these sidetracks have agreements satisfactory to the Long Island. The Elkins Act argument raised by the LIRR (Defendant's Brief, p. 9), is wholly spurious and patently false. Not charging GM for maintenance of track lying upon the LIRR-owned land does not constitute an unlawful rebate or concession under the Elkins Act (49 U.S.C.A. §41(1) et seq.), since these charges are included in the carrier's line haul

rates. Rather, to charge GM for maintenance of this track would constitute an improper, unjustified and unlawful rate increase.

## THE COMMISSION DID NOT REVERSE THE FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

Defendant alleges that the Commission, Division 3, in its Report and Order upon Reconsideration dated February 3, 1976:

> ". . . in effect reversed the above-quoted erroneous findings of the Administrative Law Judge. . ."
> (Defendant's Brief, p. 11)

This allegation does not stand up in the light of what the Commission actually said and did, as quoted below:

> "We now reopen this proceeding upon our own motion in order to clarify several issues arising in connection with §1(9) of the Interstate Commerce Act."
> (351 I.C.C. 691, at p. 69)

The Commission discusses the Administrative Law Judge's conclusions on pages 692 and 693 of its Report and Order. It said there:

> "As previously indicated, we adopted these conclusions and findings as our own."

REPLY BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

On page 697 of its Report and Order, the Commission did broaden its jurisdiction to determine the lawfulness of contractual obligations at issue in cases such as these, thereby modifying somewhat its earlier holding in Ziegler Bros. v. Southern Railway Company, 157 I.C.C. 660 (1929).

This hardly constitutes reversal in effect of the findings of the Administrative Law Judge. It is instead a resounding affirmation of the Law Judge's findings and the soundness of his reasoning.

Moreover, on the issues before the Commission, the Commission reached the same conclusions on reconsideration as it had previously in its Decision of June 10, 1975, in which it first adopted and affirmed the conclusion and findings of Administrative Law Judge Ries.

THE ALLIED CONTAINER CASE CITED IS NOT ADMINISTRATIVELY FINAL AND IN FACT SUPPORTS THE POSITION OF PLAINTIFF WHEN READ IN ITS ENTIRETY

Defendant cites I.C.C. Docket 36143 Allied Container Corporation v. Maine Central Railroad Company extensively in

support of its cause. In that docket, an Initial Decision of Administrative Law Judge F. M. Dolan, dated April 22, 1976, and served April 29, 1976, considered the question of whether shippers having private sidetracks on the Maine Central should bear the costs of construction and maintenance of the switch connections. When read in its entirety, this Initial Decision is not inconsistent with the Commission's Decision in the instant case but rather follows the principle of the instant case and in fact cites the holding of the Commission in Docket 35790 General Motors Corporation v. The Long Island Rail Road Company, the instant proceeding. In fact, GM v. LIRR is cited extensively by Administrative Law Judge Dolan on Sheets 6-9 of his Initial Decision.

General Motors respectfully directs this Court's attention to the fact that Allied is by no means settled, and that exceptions have been taken by the shipper. A copy of the Initial Decision in Allied will be provided to this Court by the attorney for the Interstate Commerce Commission. If the Initial Decision in Allied is eventually upheld, the case is still distinguishable by the facts from the instant case in that Maine Central was found to have proved its position on the

record while the Long Island has failed to do so. As the Commission noted in GM v. LIRR on page 696 of its Report and Order:

> "We find that, on the present record, respondent may not lawfully impose the proposed maintenance charges upon petitioner and that, in the absence of a change in the practicability, safety, or sufficiency of traffic to petitioner's sidetrack, respondent may not terminate service over the involved switch connection."

The Long Island refers to its freight deficits without mentioning that the freight traffic handled for GM is profitable as has been established in the record. Following the reference to its freight traffic, the LIRR then went on to discuss its losses in general, and its divisions with other carriers, which the LIRR regards as unsatisfactory. However, the financial circumstances of a carrier do not entitle it to treatment different and special from that accorded all other carriers. Federal statutes must apply equally to all parties in a given class, and can allow no deviation in individual cases no matter how grave a real or imagined plight may be.

REPLY BRIEF OF PLAINTIFF, GENERAL MOTORS CORPORATION

## CONCLUSION

General Motors Corporation again asks that the Decision of the Commission in its Report and Order dated February 3, 1976, and served March 17, 1976, be adopted by this Court and that a permanent injunction issue prohibiting the Long Island from terminating service over the above switch connection.

Respectfully submitted,

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JOINT REPLY BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| GENERAL MOTORS CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>THE LONG ISLAND RAILROAD COMPANY,<br><br>Defendant. | Civil Action No.<br><br>72-C-1549 |
| THE LONG ISLAND RAILROAD COMPANY,<br><br>Third-Party Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,<br><br>Third-Party Defendants. | |

JOINT REPLY BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Initial briefing in the case at bar was by concurrent filing of pleadings by the parties. Although the Government submits that its initial brief fully answers the main allegations of the Long Island Rail Road ("LIRR") we take this opportunity to meet some contentions raised by LIRR in its brief.

JOINT REPLY BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

1. LIRR cites extensively in its brief (Br. at 12-14, 17, 20) the decision of Administrative Law Judge Dolan in Docket No. 36143, Allied Container Corporation v. Maine Central Railroad Company.[1/] First, we note that this is only an initial decision, at the first level of Commission adjudication, to which exceptions have been filed, and therefore carries no precedential value upon judicial review in this Court. The recommended opinion does not yet represent the views of the Commission.

Second, the Allied Container case presents a situation factually divergent from the one at bar. The matter at issue there involves "the contractual terms requiring industry to bear the costs of construction and future maintenance of a suitable connection and lead tracks on railroad property." (M/S p. 7). In Allied Container, unlike the case at bar, it was found:

> "The evidence demonstrates that Maine Central has maintained the same policy for the past 50 years requiring industry to bear the costs of installation and maintenance of private sidetracks including switch connections and spur or lead tracks. By so doing defendant has not charged those costs to operating expenses, they have not formed a part of its rate base, are not recovered by revenue from the line-haul rates and there is no duplication or over compensation. In fact, since such costs are borne by industry, its rate level should be lower than if those costs were borne by the carrier." (M/S, pp. 7-8).

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1/ We have attached as Addendum A a certified copy of this decision for the convenience of the Court.

2. As we pointed out in our initial brief, this case involves a simple failure by LIRR to meet the statutory requirements of Section 1(9) of the Act, 49 U.S.C. §1(9).

> We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial. (351 I.C.C. 698-99).

## CONCLUSION

In the final analysis, the instant case presents a simply evidentiary failing by LIRR. No argument raised by that railroad warrants remand of the instant matter to the Commission.

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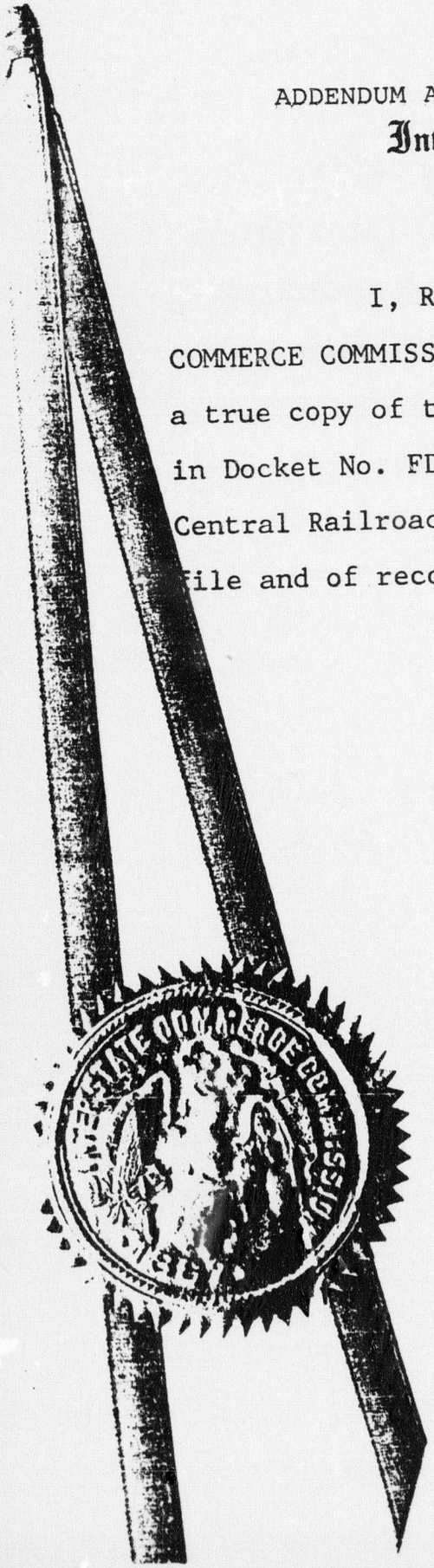
ADDENDUM A, ANNEXED TO FOREGOING REPLY BRIEF.

**Interstate Commerce Commission**
Washington, D.C. 20423

I, ROBERT L. OSWALD, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Initial Decision, served April 29, 1976, in Docket No. FD-36143, Allied Container Corporation v. Maine Central Railroad Company, the original of which is now of file and of record in the office of said Commission.



IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 13th day of September, A.D., 1976.

Robert L. Oswald
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

ADDENDUM A, ANNEXED TO FOREGOING REPLY BRIEF

INTERSTATE COMMERCE COMMISSION

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SERVICE DATE

INITIAL DECISION

APR 29 1976

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No. 36143

ALLIED CONTAINER CORPORATION
v.
MAINE CENTRAL RAILROAD COMPANY

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Defendant's customary practice of requiring a shipper on a private sidetrack at Auburn, Me., to bear the cost of construction and maintenance, with an exception, of a switch connection to its tracks pursuant to a contractual arrangement found not shown to be unjust or unreasonable or to violate sections 1(3), (4), (6) or (9) of the act. Complaint dismissed.

George H. Pettigrew for complainant.
Philip Lawton Moore for defendant.

By Frederick M. Dolan, Jr., Administrative Law Judge:

By complaint filed February 10, 1975, as amended, Allied Container Corporation, a subsidiary of Union Camp Corporation with a plant in Auburn, Maine, alleges that defendant has subjected it to the payment of money for the cost of constructing and the obligation of maintaining a switch connection which when collected and still is unjust and unreasonable in violation of section 1 and of section 1(9) of the act. Complainant further requests that the Commission exercise its power under section 1(9) of the act establishing what constitutes "reasonable charges" for such construction and issue an order thereunder awarding it damages to the extent that such costs had been borne by it and determine that it is not responsible for future maintenance of the switch connection.

Complainant has paid $34,883 to defendant but alleges that defendant should be required to bear $22,193 with the industry responsible for the remainder or $12,690. Complainant paid an advance deposit of $11,200, however, the work by defendant on the first 170 feet actually cost an added $3,058.47 or a total of $14,258.47 which complainant has now paid. By order served February 10, 1976, defendant's motion to dismiss the complaint was denied by Division 3. The modified procedure was followed and the proceeding was assigned to me for initial decision.

Defendant moved to strike portions of complainant's reply statement (1) the allegation that defendant's actions also violated sections 1(3), 1(4) and 1(6) of the act, as an unlawful broadening of the scope of this complaint proceeding, (2) various words, phrases or other portions of the reply on such grounds as that they are improper rebuttal or erroneous characterization of complainant's evidence, (3) the amendment to complainant's exhibit B, accepting defendant's cost assumptions, increasing the total cost of the construction to $46,309.47 and reducing the amount of defendant's share since complainant does

not submit supporting receipts or bills. In regard to (1) above, the complaint alleged violations of sections 1 and 1(9) of the act and referred to the general duty imposed on railroads under section 1(4) to provide and furnish transportation upon reasonable request. Complainant amplified its position in its reply by referring to carrier's duties under subparagraphs 1(3) and 1(6) in addition to subparagraph 1(4). The complaint is broad enough to consider the evidence under the foregoing subsections of section 1. See Swift & Co. v. Baltimore & O. R. Co., 266 I.C.C. 55, 56 (1946) where violations of section 1(3)(a), (5), (18), (19), (20), and of sections 2(1), 3(1), and 6(7) of the act were alleged in the complaint. On brief complainant urged, and the Commission agreed that the evidence also established violations of sections 1(4), (6), and (9) of the act. To plead the law relied on, is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. Chicago, R. I. & P. Ry. v. United States, 274 U. S. 29, Fork Mountain Coal Co. v. Cincinnati, N. O. & T. P. Ry. Co., 206 I.C.C. 106, 110 (1934) and General Mills, Inc. v. Great Northern Ry. Co., 269 I.C.C. 457, 466 (1947). The motion to strike the reference in the reply to sections 1(3), 1(4) and 1(6) is overruled. The other matters objected to are generally argumentative and will be treated as such. The motion to strike the remaining portions of the reply statement is overruled.

FINDINGS OF FACT

Complainant has a plant at Auburn, Me., where it receives pulpboard, manufactures and ships out corrugated boxes and waste. When the plant was under construction, the parties entered negotiations for rail service and the installation of a private sidetrack connecting the plant with defendant's trackage. This would require 871 feet of track. The industry would pay for it. The railroad, with its own labor forces, would build the first 170 feet on a cost reimbursable basis and the industry would, with its own contractor, arrange for site preparation, grading, drainage, ballast and building the remaining 701 feet of track. The draft contract required industry to make an advance payment of $11,200 as the estimated cost of the work to be performed by the railroad. In regard to maintenance, industry would be responsible for all except for removal of snow and ice on the first 85 feet termed the switch area, which would be railroad's responsibility. Of the 871 feet, 496 are on industry property and 375 feet of track are on defendant's land. On February 19, 1974, complainant wrote defendant stating that industry's policy in the past was to build and maintain private sidetracks on its own property and the railroad would construct and maintain the track from the point of switch to the right-of-way line (i.e. on railroad property) and that industry was not all willing to go along with the agreement. Defendant replied stating that its policy was that the entire sidetrack required by an industry is paid for and owned by the industry. Thereafter the agreement was signed March 8, 1974. Complainant paid defendant $11,200. The sidetrack was subsequently constructed. Upon payment in full title and ownership of the sidetracks including the switch connection vested in the industry. On May 28, 1974, complainant wrote defendant about an initial decision of Administrative Law Judge Richard S. Rice served May 21, 1974, in Docket No. 35790 Joint Petition for Declaratory Order-Private Sidetrack-General Motors Corporation and the Long Island Railroad Company which decision was favorable to industry and thereafter the present complaint was filed.

ADDENDUM A, ANNEXED TO FOREGOING REPLY BRIEF

For at least 50 years it has been the customary practice and is now the policy of defendant not to absorb any costs associated with installation and maintenance of privately owned sidetracks, including their switches and leads. Currently on the lines of defendant there are more than 190 active privately owned sidetracks with a switch and connection on this railroad's right-of-way, each of which is subject to effective agreements with private industry to be served thereby.

Those industries constructing sidetracks on, or adjacent to, the property of defendant have borne the entire cost of sidetrack construction and maintenance. This includes all costs from and including the point of switch to the end of the industrial sidetrack excepting the cost of snow removal in the switch or turn-out area, which cost is directly associated with main line track operations and is borne by the railroad.

Because of the labor agreements with its track forces, defendant must install the main line turn-out. The material installed must be compatible with its standards. Defendant installs, at the expense of industry that portion of the track from point of switch to the clearance point, which in the case of complainant's siding, amounts to a total distance of 170 feet of track from the point of main line connection. The clearance point is located where the center line of the divergent track reaches 13 feet from the center line of the main running track.

The total width of the Maine Central right-of-way varies from 66 to 99 feet. Because the main track is normally located in the center of the right-of-way, the length of that portion of diverging industrial sidetrack located on railroad land will vary considerably.

In the case of complainant's sidetrack the portion of the track constructed on defendant's right-of-way had to be lengthened because (1) the building entrance elevation was about 4½ feet lower than the main track elevation, and (2) the track had to be laid out along the railroad right-of-way to avoid encroaching on the private land of an abutter before diverging into complainant's land.

After defendant constructs and places in service an industrial sidetrack the subsequent cost of maintenance is borne by the industry under the terms of the sidetrack agreement signed by the industry. Such agreements are usually written to comprehend railroad forces performing the required track maintenance work, on a cost reimbursable basis; however, an industry may elect to maintain the track. There are only three industries on defendant's entire system that perform their actual maintenance. Although the standard maintenance agreement gives the railroad authority to maintain the track, it is normal procedure for the railroad to first notify the industry of the extent and approximate costs involved before undertaking the required maintenance work. There are 13 industries served by defendant that give blanket authority to the railroad to perform required maintenance work without prior notification.

Track maintenance comprehends those repairs or adjustments that must be made to keep the track safe for train operations. Winter and spring conditions in this northern climate frequently cause the track to heave or settle. The specific maintenance work includes such matters as track resurfacing and realignment, tightening bolts, correcting track guage and spiking, adjusting switches, clearing out

ADDENDUM A, ANNEXED TO FOREGOING REPLY BRIEF

flangeways, replacing crossties and track components; and, except for snow and ice removal within the main line operating area, are payable by industry when such work is performed thereon.

POSITIONS OF THE PARTIES

Complainant contends (1) that it should be responsible only for the 496 feet of track on its property and the carrier should be responsible for that portion of the track on its property because of the general duty imposed upon all common carriers by railroad by section 1(4) of the act to provide and furnish transportation upon reasonable request; (2) that, assuming all of the statutory conditions are satisfied, the construction and maintenance of a switch connection to a private sidetrack located wholly on a railroad's right-of-way is to be done at the carrier's expense citing section 1(9) of that act; (3) that contrary to its experience with about 200 sidetracks this is the first occasion in which it has been required to bear the burden of constructing and maintaining a switch connection on railroad property.

Defendant contends (1) that complainant has not presented a compelling reason for the Commission to exercise jurisdiction in this proceeding; (2) that a switch and connection have already been installed pursuant to a viable agreement between the parties which contained mutual and respective considerations which neither party had prior legal duties to perform and that section 1(9) would be applicable only if the defendant had failed to install or operate a switch connection; (3) that the Interstate Commerce Act does not prohibit, as a matter of law, industry responsibility for costs of construction and maintenance of a switch and lead track connection to a private sidetrack; (4)(a) that it has no duty to bear the cost of constructing sidetrack under section 1(4) or section 1(9); (b) that its customary practice which has been to make shippers on its line seeking the benefit and use of private sidetracks responsible for all such costs under standard sidetrack agreements, excepting the costs of snow and ice removal within the turn-out area of main-line operations, has not been shown to be unreasonable; (5) that the actual charges are not shown to be unreasonable; (6) that the charges for construction and maintenance herein have not been shown to be charges for "transportation"; (7) that any alteration in defendant's customary policy of industry responsibility for direct costs associated with construction and maintenance of right-of-way facilities serving private sidings would be unreasonable.

DISCUSSION AND CONCLUSIONS

The issue is whether it is unjust and unreasonable or in violation of sections 1(3), (4), (6) or (9) of the act for a railroad and an industry to contractually agree for an industry to bear the cost of constructing and of future maintenance generally of a switch connection and lead tracks located on railroad property and connecting with an industry sidetrack.

It may be helpful initially to set forth a few basic principles. A carrier has no obligation to construct or maintain private sidetracks either under the act or at common law. Winters Mettelic Paint Co. v. Chicago, M. & St. P. Ry. Co., 16 I.C.C. 587, 589 (1909), Sioux City Term. Ry. Switching, 241 I.C.C. 53, 70 (1940). In the latter

proceeding a carrier was found in violation of section 3(1) for constructing and maintaining private sidetracks for some industries but not others. See also Switching at Richmond, Va., 245 I.C.C. 293, 300 (1941) and Shaw Warehouse Co. v. Southern Ry. Co., 308 I.C.C. 609, 630 (1959).

Section 1(9) provides as follows:

> Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Thus, once a private sidetrack has been constructed to connect with a railroad and application made the carrier must construct, maintain, and operate "upon reasonable terms" a switch connection with the private sidetrack "where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." If the prerequisite statutory conditions exist, the connection must be made whether desired by the carrier or not. Imperial Wheel Co. v. St. L., I. M. & S. Ry. Co., 20 I.C.C. 56, 59 (1910).

Section 1(9) also provides that for constructing, maintaining and operating a switch connection a carrier is entitled to "reasonable terms" and in another sentence "reasonable compensation." The two sentences comprising section 1(9) complement each other the first setting forth the conditions upon which the carrier's duty exist. The second gives the Commission authority to order the carrier to fulfill that duty if it shall fail to install and operate any such switch or connection when all the requisite conditions are present. The Commission is also empowered to determine as to the safety and practicability justification and reasonable compensation in regard to the switch connection. "Justification" refers to whether a shipper will furnish

## ADDENDUM A, ANNEXED TO FOREGOING REPLY BRIEF

sufficient business to justify the construction and maintenance of the switch connection. "Reasonable compensation" refers to the duty of the carrier to construct, maintain, and operate the switch connection "upon reasonable terms." "Reasonable compensation" was determined in, for example, M'rae Terminal R. v. Southern Ry. Co., 12 I.C.C. 545, 547 (1907) where the Commission stated: "We are of the opinion that $150 would be compensation for installing the switch and sufficient track so that a car might clear as indicated by the superintendent, of maintaining the same for two years, and of paying whatever slight damage may be done to the Seaboard right of way. We are further of the opinion that this connection is entirely practicable; that it does not add much to the hazard of operating the Seaboard Air Line Railway, and that the business in sight is sufficient to justify the connection." See Virginia Coal & Fuel Co. v. N. & W. Ry. Co., 55 I.C.C. 61, 64 (1919).

The weight to be accorded the contract signed by the parties on March 8, 1974, is also at issue. In Sioux City Term. Ry. Switching, supra, the Commission found that "But even if it be a fact that the Stockyards Company entered into contracts with Cudahy & Armour at the time they located in Sioux City, to provide and maintain loading and unloading tracks for their use within their respective plants, it does not follow that respondent is bound to continue to carry out those terms of the contracts, if doing so violates the provisions of the Interstate Commerce Act or related acts. Contracts which are in derogation of regulatory authority are void and unenforceable. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U.S. 361; Armour Packing Co. v. United States, 209 U.S. 56; Louisville & N. R. Co. v. Mottley, 219 U.S. 467; United States v. Union Stockyard, 226 U.S. 286; Davis V. Cornwell, 264 U.S. 560."

A factual situation similar to the present proceeding was considered in Ziegler Bros. v. Southern Ry. Co., 157 I.C.C. 660 (1929) where complainant and defendant entered into a contract whereby defendant was to build a private siding for complainant and install a switch connection for a certain specified sum. Complainant paid for the entire work, $682.50 of which was shown as the amount for installing the switch. The Commission treated the complaint, alleging that the charges collected were unreasonable, as one falling under section 1(9) and found as follows: "/That section/ does not authorize us to determine what a reasonable charge would be for a switch connection that has been installed and in operation. Our jurisdiction extends only to the consideration of the installation of switch connections when carriers refuse or fail to install such connections." The complaint was dismissed.

The Ziegler Bros. case was recently discussed in Docket No. 35790 referred to earlier which culminated in a report of Appellate Division 3 in General Motors Corp., Long I. R. Priv. Sidetrack, 351 I.C.C. 691 (1976) herein termed the General Motors case, the decision in which was served March 17, 1976. That report dealt with the question of whether the Long Island Railroad Company may lawfully precondition continued rail service to the private sidetrack of General Motors Corporation at Bethpage, N. Y., upon GM's entering into an agreement to bear the maintenance expenses for the switch connection to that private sidetrack. That report distinguished the Ziegler Bros. case on the fact of the pre-existing contract or agreement for the construction of the switch connection, the same as in the instant proceeding, as follows: ". . . service over the switch connection was conditioned

from the outset upon shipper's undertaking to compensate the carrier for the cost associated with the switch connection."

The General Motors report, noting the disclaimer of jurisdiction in the Ziegler Bros. case. -

"Our jurisdiction extends only to the consideration of the installation of switch connections when carriers refuse or fail to install such connections" - found it too broad.

While noting that the Commission has been careful not to interfere with contractual disputes concerning costs of construction and maintenance of switch connections Appellate Division 3 stated that "it is inconsistent to hold that the Commission can prescribe reasonable compensation for construction when it orders institution, but can not review the reasonableness of such compensation if voluntarily agreed to by the parties." This is interpreted to mean that, despite parties voluntarily entering into a contract setting forth compensation for construction of a switch connection, at some later date upon request of either party the Commission can review the reasonableness of the terms of that contract in regard to compensation.

This new rule will now be applied to the facts in this proceeding. The parties signed the contract but there is disagreement and complainant desires a review of the terms of compensation. It must again be emphasized there there is no real disagreement over the amounts for constructing the tracks or for prospective maintenance but rather with the contractual terms requiring industry to bear the costs of construction and future maintenance of the switch connection and lead tracks on railroad property.

Turning again to the wording of the report in the General Motors case, the basis for the change in policy is found on page 697 of that report as follows: ". . . maintenance costs are usually chargeable to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection. An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line-haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges. . ." While the agreement in the General Motors report only dealt with maintenance expenses the report also speaks of construction costs and the principle would be the same since title and ownership of the switch connection vested with complainant. Applying that rationale here defendant Maine Central would be responsible for the construction and maintenance expenses of the switch connection if it charges such expenses to its operating expenses, if they form a part of its rate base and are recovered from operating revenue produced by the rates for delivering over a switch connection. The evidence demonstrates that Maine Central has maintained the same policy for the past 50 years requiring industry to bear the costs of installation and maintenance of private sidetracks including switch connections and spurs or lead tracks. By so doing defendant has not charged those costs to operating expenses, they have not formed a part of its rate base, are not recovered by revenue from the line-haul rates and there is no duplication or over compensation. In fact, since such costs

are borne by industry, its rate level should be lower than if those costs were borne by the carrier. Moreover, defendant does not justify transportation rate increases on the basis of private switch and lead track construction and maintenance costs.

To compel defendant against its established custom to absorb the right-of-way lead and switch costs for private sidings and to allocate them to its general costs of doing business would inevitably result in the necessity of increasing its line-haul transportation rates which would be borne by all railroad shippers and receivers on its system who, not being authorized to load or unload at such sidings, would not obtain a direct benefit therefrom.

Any decision altering the terms of the March 8, 1974, standard agreement would immediately advantage complainant and discriminate against the 190 other industries who are now served by private sidings both on as well as extending off defendant's rights-of-way. Such a decision would be particularly discriminatory in respect to those shippers who have established private sidings wholly located within defendant's right-of-way and who could not invoke section 1(9) since there is no "private sidetrack" with which to connect. Compare Schlicher v. Director General, 62 I.C.C. 181 (1922).

At a time when railroads throughout this nation are faced with the burden of sustaining excessive fixed capital assets with limited liquid assets, it would seem inappropriate to require a railroad to take on the additional burden of financing the installation and maintenance of a right-of-way facility, a switch connection, for the primary if not sole benefit of a single shipper, especially when that railroad customarily and regularly for half a century has placed that responsibility directly with the immediate beneficiaries of such a facility.

As to the alleged violations of other sections of the act, it seems clear that since Congress legislated specifically in section 1(9) with regard to switch connections and in view of the reversal of policy on the jurisdictional question in the General Motors case the inquiry should be confined to that section of the act in exploring the rights and duties of the parties. In any event the general duty imposed under section 1(4) to provide and furnish transportation upon reasonable request cannot be stretched to include an obligation to construct and maintain a switch connection. The rail carrier can satisfy its duty under its line-haul rate by delivering carload freight at a team track. Nor can the duty under section 1(4) to provide and furnish transportation upon reasonable request be interpreted as affording complainant a means of abrogating the terms of the contract. There is no indication that the defendant has failed to deliver or pickup freight over complainant's sidetrack at Auburn nor in any other manner failed to render transportation upon reasonable request. The facts complained of do not substantiate a violation of section 1(4) of the act.

In regard to whether defendant is guilty of an unreasonable practice or otherwise unjust or unreasonable in declining to bear the cost of installing and maintaining the switch connection, complainant has not established that defendant is acting contrary to its customary practice or established unlawfulness in this respect.

ADDENDUM A, ANNEXED TO FOREGOING REPLY BRIEF

While there is some indication that complainant has entered into a different type of agreement in regard to some 200 other sidetracks no further details were provided. In any event it would seem that rail carriers have had at least two alternatives in regard to the construction and maintenance of switch connections. One has been to follow the practice of defendant and the other has been to absorb such expenses and to make appropriate adjustments in line-haul rates as mandated by Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade, 412 U. S. 800 (1973). No evidence was introduced to support the alleged violation of section 1(3). Requested findings not specifically discussed in this report nor reflected in the findings or conclusions have been considered and found not justified or unnecessary for the proper disposition of this proceeding.

ULTIMATE FINDING AND ORDER

Upon consideration of all the evidence of record the Administrative Law Judge finds that the complainant has not established that defendant's customary practice of requiring a shipper on a private sidetrack at Auburn, Me., to bear the cost of construction and maintenance, with an exception, of a switch connection and spur track to defendant's main tracks pursuant to a contractual arrangement is unjust and unreasonable or in violation of sections 1(3), (4), (6) or (9) of the act; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, that the complaint be, and it is hereby, dismissed.

Dated at Washington, D. C., this 22nd day of April, 1976.

By the Commission, Frederick M. Dolan, Jr., Administrative Law Judge.

ROBERT L. OSWALD,

Secretary.

(SEAL)

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT AND THIRD-PARTY PLAINTIFF, THE LONG ISLAND RAIL ROAD COMPANY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GENERAL MOTORS CORPORATION
A Corporation of the State of Delaware,

Plaintiff,

-against-

THE LONG ISLAND RAILROAD COMPANY
A Corporation of the State of New York,

Defendant.

72 C 1549

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THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff,

-against-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants.

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SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT AND THIRD-PARTY PLAINTIFF, THE LONG ISLAND RAIL ROAD COMPANY

PRELIMINARY STATEMENT

Due to an erroneous understanding that only simultaneous opening briefs were to be filed in this case, defendant and third-party plaintiff, The Long Island Rail Road Company ("LIRR"), filed no reply brief prior to the argument before the Court on September 17, 1976. This

supplemental brief is being filed pursuant to the permission granted by the Court at the close of oral argument on that date.

THE ABSORPTION BY LIRR OF THE EXPENSE OF MAINTAINING THE SWITCH CONNECTION TO GENERAL MOTORS' SIDETRACK, WHILE REQUIRING ALL OTHER RECEIVERS SIMILARLY SITUATED TO PAY SUCH EXPENSES, WOULD RESULT IN UNLAWFUL PREFERENCE AND PREJUDICE AND COULD, IN THE ABSENCE OF THE COMMISSION'S ORDER, RESULT IN VIOLATION OF THE ELKINS ACT.

As the record shows, 169 other shippers and receivers signed the standard LIRR sidetrack agreements before General Motors ("GM") became the first to refuse to do so.* While holding that LIRR could not require GM to absorb the cost of maintaining its switch connection, the Commission evidently found nothing wrong in LIRR's requiring the first 169 to do so. Were this decision allowed to stand, it would result in a classic example of the type of undue preference and prejudice which the Interstate Commerce Act was enacted to prevent.

In its report, the Commission (at p. 698) states that LIRR's

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* In its reply brief, dated September 10, 1976 (at p. 3), GM implies that only 169 of the 270 shippers with private sidetracks on the LIRR have signed LIRR's standard agreements. This is not so. GM was the 170th shipper or receiver to whom the agreement was submitted, and the first to refuse. Subsequently, others did sign the agreements, but some, taking their cue from GM, refused, and the signing of additional agreements is being held in abeyance, pending resolution of the present controversy.

absorption of maintenance expenses on GM's switch connection does not "unjustly descriminate against or unduly prejudice smaller shippers not having a private sidetrack upon which to accept delivery of their traffic." That would be true if LIRR's financial condition enabled it to absorb maintenance expenses for switch connections to all shippers having private sidetracks. LIRR's financial plight does not permit it to do so, and since it must require the vast majority of its shippers and receivers having sidetracks to pay the maintenance cost for the switch connections, it clearly must require GM and other recalcitrants to do so in order to avoid undue preference and prejudice.

For LIRR to absorb the maintenance expense for GM, and possibly a few other powerful corporations, while requiring other shippers and receivers similarly situated to pay such expenses would, if done voluntarily by the LIRR, undoubtedly violate the Elkins Act (49 U.S.C. §41(1) et seq.), and probably result in prosecution by the Commission's Bureau of Enforcement of LIRR and the shippers receiving such service without charge. Nowhere in the Commission's report or in the pleadings filed by Commission counsel is there any reference to the Elkins Act or any attempt to reconcile the Commission's decision herein with the provisions of that Act.

## THE ALTERNATIVES SUGGESTED BY THE COMMISSION IN ITS REPORT ARE COMPLETELY IMPRACTICABLE

Section 1(9) is ideally designed to enable a shipper to require a carrier to operate and maintain a switch connection where the requirements as to practicability, safety and sufficiency of traffic are present and, at the same time, to enable a carrier to receive reasonable compensation for providing this special service, which would not be required for delivery at a public team track. What is reasonable compensation, per year or per car, will vary, depending on the nature of the switch connection, the annual traffic volume, etc., but Section 1(9) enables the carrier to treat its shippers individually, yet fairly, in connection with supplying this special service.

The Commission's report would, in effect, repeal Section 1(9), so far as LIRR is concerned, but it hastens to say (at pp. 698-699):

> "We do not mean to suggest that respondent is forever precluded from establishing separate maintenance charges for switch connections to private sidetracks. Such charges would, however, have to be predicated, first upon establishing a reduction in line-haul rates to correspond with the resulting separate maintenance charge, or a showing that the existing level of line-haul rates is reasonable, despite the additional charge for maintenance, and second, upon a showing that the separate maintenance charges are reasonable and are nondiscriminatory, nonpreferential, and nonprejudicial."

It is very difficult to take the Commission's suggested alternatives seriously, although they were evidently so intended.

The Commission is well aware that the vast majority of LIRR's traffic -- more than 90 percent overall and 100 percent of the traffic moving to the GM plant at Bethpage -- is interline traffic moving under joint rates with other railroads. The Commission is also well aware that joint rates cannot be changed without the consent of all participating carriers, Ajayem Lumber Corp. v. Penn Central Transportation Co., 487 F. 2d 170,* and that there is not the slightest possibility that the connecting carriers would agree to a reduction in GM's rates to enable LIRR to make effective a separate maintenance charge.

As to the level of the line-haul rates, the evidence of record shows that in 1972, LIRR had a deficit from its freight operations of more than $11 million and sidetrack agreements with all of its affected shippers would bring in additional revenues of less than $1 million. It is difficult to imagine how anyone could make a more convincing "showing" to justify a separate maintenance charge.

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* The opinion of the District Court in that case (350 F. Supp. 111), holds that the scope of judicial review in a case such as this one, involving a referral to the Commission under 28 U.S.C. §1336(b), is nowhere near as narrow as counsel for the Commission would have the Court believe.

The Commission's second suggestion is equally ridiculous. Presumably, the separate maintenance charge suggested by the Commission would be a uniform charge per car and be published in a tariff. This would obviously be unfair and unreasonable. Some sidetrack receivers with a greater than average traffic volume, such as GM, would end up paying more each year than it costs LIRR to maintain its switch connection, while others would pay less and, thus, would have to be found to be preferential, prejudicial and discriminatory and in violation of the very decision wherein the ICC suggests this route.

Theoretically, LIRR could publish a tariff containing 270 different switch-maintenance charges for each of the 270 sidetracks, which charges would be constantly revised with changes in maintenance costs and traffic volume, but this would obviously be impracticable. Section 1(9) is ideally designed to avoid the necessity for such a tariff-publishing nightmare.

The Commission has correctly recognized that, upon a proper showing, LIRR can be reimbursed for expenses incurred in maintaining switch connections, but instead of allowing LIRR to be compensated under the provisions of Section 1(9), the Commission suggests that LIRR try some other method which the Commission knows, or should

know, is completely impracticable.

## CONCLUSION

For the reasons set forth above and in the brief filed earlier herein by The Long Island Rail Road Company, the Court should set aside, vacate and make null and void the orders of the Interstate Commerce Commission issued in the proceeding under review herein under date of June 10, 1975, and February 3, 1976.

It is also respectfully submitted that until such time as the plaintiff, General Motors Corporation, signs and executes the standard sidetrack agreement proffered it by defendant and third-party plaintiff, The Long Island Rail Road Company, that the aforesaid Long Island Rail Road Company should be permitted to make delivery at nearby team tracks and to refuse to further service the private siding of General Motors Corporation, and for such other and further relief as may seem just and proper in the premises.

Respectfully submitted,

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RICHARD H. STOKES
BRIAN J. BARRETT
WALTER J. MYSKOWSKI
Of Counsel

BRIEF AFTER TRIAL OF PLAINTIFF, GENERAL MOTORS CORPORATION.

UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF NEW YORK

GENERAL MOTORS CORPORATION
A Corporation of the State
of Delaware

Plaintiff

v.

THE LONG ISLAND RAIL ROAD
COMPANY
A Corporation of the State
of New York

Defendant

Civil Action 72 C 1549

THE LONG ISLAND RAIL ROAD
COMPANY

Third Party Plaintiff

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Third Party Defendants

/

BRIEF AFTER TRIAL OF PLAINTIFF
GENERAL MOTORS CORPORATION

Comes now General Motors Corporation (hereinafter sometimes referred to as "General Motors" or "GM"), by its attorneys Benson T. Buck and Leonard F. Charla, and submits

this its Brief After Trial in the captioned proceeding. The purpose of this Brief is to address certain questions raised in the oral argument before this Court on September 17, 1976.

1. The position of General Motors is that the Long Island Rail Road Company (hereinafter sometimes referred to as "Long Island" or "LIRR"), through its actions in the record below, seeks to impose an additional charge on General Motors at GM's sidetrack at Bethpage. The Long Island threatened to suspend service over that sidetrack in violation of Sections 1(6) and 1(9) of the Interstate Commerce Act (49 U.S.C.A. §§1(6) and 1(9)), if GM did not acceed to its demands.

The imposition of a maintenance charge by the LIRR for a service previously included in the carrier's line-haul rates can only be construed as an unlawful rate increase in violation of §§1(6) and 6(1) of the Interstate Commerce Act (49 U.S.C.A. §§1(6) and 6(1).) Section 1(6) of the Act require carriers to establish inter alia, just and reasonable practices for the delivery of freight. [Section 1(6) of the Act is set forth in full on page 9 of the Plaintiff's Brief.] Section 6(1) of the Act requires all rates, fares and charges imposed by the carrier to be published. It states, in pertinent part:

> "§6(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established."

The record does not show the Long Island made any effort to publish the maintenance charge in any of its tariffs, yet its attempt to impose a new charge for a service previously performed under its line-haul rates clearly amounted to a rate increase for General Motors.

When GM resisted the Long Island's attempts to impose the new charge, the Long Island threatened to suspend service over the switch connection in violation of Section 1(9) of the Act.

The Supreme Court, in Atchison T. & S. F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 805-897 (1973), has held that imposition of new charges for items previously included in the carrier's line-haul rates amount to rate increases and must be justified by the carrier. In situations in which a

carrier feels rate increases are justified, the carrier may reduce the line-haul rate and impose a separate charge; maintain the line-haul rate at the previous level; or raise the line-haul rate while not imposing any additional charge. It is important to note that any or all of these actions are changes in rates and thus the publication of these changes in the carrier's tariffs are required by §6(1) of the Interstate Commerce Act.

The Long Island, by its actions in 1972 in the matter before this Court, sought to circumvent the established procedure under statute and achieve a "back-door" rate increase. GM believes carriers are entitled to a fair return on their investment, but is equally important for carriers to observe existing laws and established procedures when seeking rate increases. These procedures have been established by statute and by the I.C.C., and their purpose is the protection of the public interest.

2. The Long Island has raised more than once the question of the Elkins Act. No Elkins Act question is at issue, and the Court may confidently so rule. The Elkins Act (49 U.S.C.A. §41, et seq.), is meant to prevent undue preference.

(Emphasis supplied.) Here, there is no preference which is in any way undue. The Commission and the Courts have long recognized that large shippers in certain instances may require treatment somewhat different from that accorded small shippers for the simple reason that large volumes of traffic shipped with consistency in well-defined patterns produce transportation efficiencies which are not present in small, sparadic traffic movements. General Motors is a shipper whose volume of business justifies and requires receipt of service over a private sidetrack as provided by Section 1(9) of the Interstate Commerce Act.

Traditionally, some small shippers have received and shipped goods by rail via public team tracks because they have elected not to incur the expense of owning and constructing private sidetracks. On the other hand, most large shippers tender and receive freight over their own industrial sidetracks. This dual system has existed at least since §1(9) was enacted in 1906. There is nothing about this "preference" which is undue; if all large volume shippers were to suddenly be required to conduct all their business over public team tracks, it is safe to say the nation's rail system would be inadequate

to handle the level of traffic tendered at those team tracks. Thus, private sidetracks serve and benefit the carriers as well as the shippers, and where large shippers may seem to receive a "preference" based upon considerations of freight volume tendered to the carrier, this is not an undue preference in accordance with well-established legal precedent. Nor can resistance to an unlawful rate increase be construed as a violation of the Elkins Act by any stretch of the imagination.

Nothing in the record or in the Decision of the Commission mandates a remand of the instant procedure to the Commission. In the event the LIRR now decides to impose charges for switch connection maintenance on private sidetracks along its lines, the changes may be effected through published charges in its tariffs.

As to the instant matter, the Long Island has failed on the present record to justify its previous actions vis-a-vis the Bethpage sidetrack and the Decision of the Commission should be affirmed and adopted by this Court and a permanent injunction should issue enjoining the Long Island from suspending

service over the Bethpage switch connection so long as sufficient business is furnished to justify the existence of the switch connection pursuant to §1(9) of the Interstate Commerce Act.

Respectfully submitted,

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Of Counsel:
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TRANSCRIPT.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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GENERAL MOTORS CORPORATION, :

-against- : 72-C-1549

LONG ISLAND RAIL ROAD, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

September 17, 1976
2:00 p.m.

B e f o r e :

HONORABLE JACOB MISHLER, Chief U.S.D.J.

RAYMOND P. STALKER
ACTING OFFICIAL COURT REPORTER

TRANSCRIPT

Appearances:

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BY: RICHARD H. STOKES, ESQ.

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and
MICHAEL JENSEN, ESQ.
General Counsel, I.C.C.
Washington, D.C.

TRANSCRIPT

THE CLERK: General Motors against Long Island Railroad.

THE COURT: I had set this down for 2:00 o'clock and you've waited until 2:30.

Are you on the General Motors case?

MR. JENSEN: I'm here for a very limited purpose. I just want to introduce Raymond Ripple from the office of the Interstate Commerce Commission and move his admission for the purposes of this litigation. He'll be representing both the interest of the Interstate Commerce Commission and the United States.

THE COURT: Permission is granted. Who is for General Motors? Are you Mr. Buck?

MR. STOKES: Mr. Buck is not here today. I am rles Stokes. Basicallysince the Long Island Railroad is challenging the decision and order of the Interstate Commerce Commission in this proceeding, I assume it's appropriate that I lead off, your Honor.

THE COURT: All right.

MR. STOKES: I presume basically the Court has had an opportunity to read the papers and is somewhat familiar with the issue?

THE COURT: I'm sorry, I wish I could say that. Isn't this the same claim that was before me concerning the elimination of the side track for the General

TRANSCRIPT

Motors out on Long Island.

MR. STOKES: If your Honor wishes, I could give a brief resume.

THE COURT: I think it would be helpful.

MR. STOKES: Basically back in the 1950's and a prior period, Long Island had a policy of requiring all owners of side tracks to sign an agreement whereby they would assume the cost of maintaining the switch connection.

During the 50's in order to meet motor carrier competition the Railroad changed its policy. At that time we were making a profit on our corporation. We assumed voluntarily the cost of maintaining the switch connections. We no longer charged the carriers.

Then, when we began to rack up substantial freight deficits we changed our policy.

Now, shortly before changing our policy in the late 1960's this side track or the General Motors facility at Beth Page had been constructed. No agreement had been signed but the side track in this connection was constructed. Then we changed our policy and we submitted this agreement to General Motors which they refused to sign.

THE COURT: When you say constructed?

MR. STOKES: Yes.

TRANSCRIPT

THE COURT: Did the Long Island Railroad construct it or General Motors?

MR. STOKES: I'm not sure who did the actual physical construction. But G.M. paid for the portion of side track on their property. The Railroad paid for the installation of the switch connection on its property.

THE COURT: Where is the switch, is that on the borderline?

MR. STOKES: The switch would be coming off the main line.

THE COURT: On your property?

MR. STOKES: On our property; and then it runs up to the property line, the right of way line and then the property of General Motors goes off from that.

THE COURT: Do you think that's of any significance in the argument, as to where the switch is?

MR. STOKES: Yes. In other words, the practice in many of the railroads has been that the industry assumes the cost ontheir property and the Railroad assumes the cost on its property. But, our position is under Section 19 of the Interstate Commerce Act, we are entitled to recover the cost of operating and maintaining this switch connection, even though it's

on Railroad property. But, there's no question that many other railroads follow a different practice and during this period of time, from the mid 1950's to the late 1960's, to meet motor carrier competition the Long Island Railroad followed this policy. But, as I say because we've had deficits during the late 1960's, the policy was changed.

When we changed our policy we had roughly 27 signed agreements. At the time this case came into litigation and at the request of the Court it was admitted to the ICC for an advisory opinion. We had roughly 160 of our industries signing the modified agreements whereby these industries agreed to assume this cost. They recognized the deficits that the Railroad was incurring and they agreed.

Now, with the refusal of G.M. to sign this agreement, we took the position we were not required to service their side track since they refused to sign our standard side track agreement-

G.M. applied to this Court for injunctive relief. We consented to the issuance of a T.R.O. while the matter was referred to the Interstate Commerce Commission for declaratory order and advisory opinion.

The matter went through, was initially assigned

under a modified procedure through an administrative law judge who issued an initial decision affirming the position of G.M. that the Long Island's reimbursement was covered in the line haul rates and we were not entitled to recover these expenses in a separate charge under the side track agreement.

On exceptions Division 2 affirmed the initial decision of the administrative law judge and we petitioned for reconsideration. On reconsideration at Division 2 of the Interstate Commerce Commission, again they reaffirmed the previous decision.

That basically is the procedure. The fundamental issue is of course the I.C.C. orders and decisions under review herein based upon substantial evidence of record and in accordance with the mandate of the statute.

THE COURT: Substantial evidence on what issue?

MR. STOKES: On the issue -- we say on the issue of whether we are receiving reimbursement of our switch maintenance course from the line haul rates. In other words, does the evidence show that we are receiving reimbursement?

THE COURT: I assume General Motors agrees that is the issue?

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MR. STOKES: I believe that they -- General Motors position is that the evidence of record shows that we are receiving reimbursement under the line haul rates and this is substantial evidence of record to sustain the Commissions order. We say no. The evidence shows the Long Island is not receiving the reimbursement of our switch maintenance cost and then if we are not receiving it, the other question underlying the fundamental issue here is whether under the alternative suggestion by the Interstate Commerce Commission, canthe Long Island receive reimbursement of switch maintenance cost? We answer this in the negative too.

THE COURT: Are you asking for payment today or are you asking for a ruling on the prospective cost?

MR. STOKES: Basically what we'reasking the Court to do is to find that the Interstate Commerce Commission's orders, which find that the Long Island is receiving its line haul rates or it is receiving reimbursement from the line haul rates, the compensation to reimburse it for the cost and maintaining these private switch connections is arbitrary, capricious, and that in essence it's contrary to the

statute.

THE COURT: I understand. You're seeking damages in the effect --

MR. STOKES: If the Court finds that the order is arbitrary and capricious and sets it aside and annuls it, that it then denies the application of General Motors for an injunction, restraining us from reducing service to the side track until they sign our standard agreement which calls for them to pay these costs.

THE COURT: I understand that, but I'm looking at it with a larger view. Wouldn't you have the right to apply for the increase in the line haul rates before the Interstate Commerce Commission?

MR. STOKES: I'm going to that right now. That goes right to the heart of our argument. I hope I will answer it very satisfactorily to your Honor.

Now, Section 19 of the Act spells out that a carrier is entitled to reasonable compensation for constructing, operating and maintaining a switch connection. Obviously, if the Federal Government, through a statute, requires a railroad to construct and operate and maintain such a switch connection for the benefit of a private industry, where such operation

and maintenance involve final cost to the carrier and which carrier is then presented or prohibited from obtaining reimbursement of these costs, the statute must be found unconstitutional as being volitive of the due process cause.

In other words, the statute can impose a duty on us, but if that duty involves costs, they must permit us to get it back. So, Section 19 to be constitutional, must allow us to obtain reasonable reimbursement for these costs.

The ultimate question in this proceeding is twofold: Do the line haul rates provide the Long Island Railroad reasonable compensation for the operation and maintenanceof the General Motors switch. If not, what is the reasonable compensation to which we're entitled and how can we get it?

Now, the record clearly shows, and we put in evidence of our own annual deficits from freight operations. These are approximately $11,500,000 a year as of 1972. Since then of course our statements filed with the Commission shows that the deficit situation, our freight operation has gotten even worse. The real extent of this deficit is perhaps more fully appreciated when you become aware of our freight

revenues in 1971, they were only $9,200,000. In other words, the Long Island freight costs over $2 for every $1 of revenue that we received.

As we point out in page 16 of our brief, our freight revenues in 1972 failed to cover even our transportation cost of $10,200,000, much less than the maintenance cost of $2,400,000 which is where these assigned expenses are accounted for --

THE COURT: Now, those statistics don't meet the issue. You're talking about the cost of maintaining the switches.

MR. STOKES: Yes, your Honor.

THE COURT: Aren't you? How much does it cost to maintain those switches?

MR. STOKES: It costs approximately -- that switch costs approximately $3900 a year. Now, the Government, the Interstate Commerce Commission is saying, "Well, yeah, but you're being reimbursed out of the line haul rates."

THE COURT: You have cited millions of dollars.

MR. STOKES: We have received $9,200,000 in freight revenues, but our operating expenses and operating costs, including maintaining the switch is over 20,000,000.

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THE COURT: The question is who shall maintain the switch, who pays the $3900. What does that have to do with the millions of dollars you are suffering on the rail lines?

MR. STOKES: Because we cannot recover these costs from the line haul revenue. If we try to increase the line haul rate to recover this cost and of course this is one out of two or three hundred. So we're talking about 5 or$600,000 altogether. If we try to increase this, these are inter-line rates. Ninety five per cent of our traffic we interchange with another railroad.

Those rates first of all cannot be changed without the concurrence ofthe other carrier. They are subject to division and the basic average that the Long Island Railroad gets is roughly 20 per cent of the line haul rates as our division. So, if we increase, put this in as an increase of the rate we only get back 20 per cent.

THE COURT: Yes.

(Continued on next page)

MR. STOKES: The other railroads get the other 80 percent. So we have not recovered our cost and we cannot recover it by increasing the line haul rates because the other railroads, we've had this fight with them many times, if you increase the line haul rates to recover specific cost we want our share. So, we tried to put it in, we only get 20 percent back. This is what the line haul rates do not compensate us for, our cost.

Now, if we try and do as the commission suggested in another way, reduce the line haul rates and set up a separate charge, the other railroads again, we need their concurrence and consent to change the line haul rates and they will say yes you can reduce the rate, but it's going to come out of your 20 percent. Don't ask us to assume any of it. Don't expect us to reduce our portion. We are no better off than we were in the first place. We just transfer it from one pocket to another and we are not receiving the compensation. It's a mechanical standoff.

So, neither of the suggestions of the commission, while they sound fine in theory, when they are practically examined they do not give the Long Island Railroad its reimbursement. We're not meeting any of

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our full costs from the line haul rates because we are suffering a $10-million deficit. Yes, compared to the 3,000 or $4,000 for one switch a $10-million deficit is a fantastic figure. That $10-million deficit is made up partially by the $4,000 and the other carriers are getting a windfall from it based on our expence, butthey get 80 percent. There's no way we can change the rates unless we triple or quadruple them, because our 20 percent then would be trimmed. The rates, the ICC first of all wouldn't allow it. They would say this is an unreasonable increase and secondly it would mean that the shippers and receivers on the Long Island would be then prejudiced because they would have to be paying the stupendous rates compared to the other people in the New York area, such as in Westchester and the Bronx and over on the Jersey Shore. They couldn't compete.

So, they would never allow us to bring the rates up where our division of that revenue would allow us to recover our cost.

Now, the ICC also suggests that the volume of traffic justifies the maintenance of this private siding. The undisputed facts of the record show, and these were not challenged when we put them in, that it

is more expensive for us to serve this private siding than it is to give them service at the public track at Hicksville, just a mile or two away. The ICC's position which says that the volume of traffic here justifies the existence of a private siding assumes certain factors that are not in the record. Namely, that General Motors traffic, if it were diverted to Hicksville, this would overutilize the facility there by causing an additional expense to the railroad.

Now, the true facts, even though they are not in the record show that the Hicksville station is presently greatly underutilized and the General Motors traffic could easily be handled there without any additional expense. We would save money.

The ICC's position also assumes that the General Motors traffic reimburses the Long Island through its line haul rates for the extra expenditures involved in maintaining the private siding; as we have shown the facts to the contrary before we put this car on the siding, we lost the money. We are operating on a deficit before we even get that car to the GM siding.

Well, basically our position is set out in our pleadings and brief. I just want to mention one thing;

we understood no reply briefs were to be filed. In our initial brief we pointed out that we have agreements with 160, actually more now, although the whole question is being held in abeyance and pending this thing, contracts with other industries who have signed this and who have assumed this cost, to give GM a privileged position here and say they don't have to do it. This would be in violation of the Elkins Act. The Government does not address itself at all in the reply or anywhere else about the Elkins Act question. General Motors is brushing it aside and saying the compensation comes from the long line haul rates. But we're not being compensated in the line haul rates as to the cost and there is an Elkins Act violation, that is General Motors is being allowed a privilege.

THE COURT: You're claiming an unlawful rebate?

MR. STOKES: Yes, your Honor.

THE COURT: How?

MR. STOKES: Because it is costing us, as we showed in the evidence before the commission which was not disputed, there was no challenge to that evidence; it costs us more to serve that siding, private siding than it does the public track facilities. General

Motors has put in evidence showing that they received great benefits from the private siding. It cost them less to operate by having us put the traffic in on that private siding.

Now, if it costs us more to serve them on that siding, these costs and these costs are not being reimbursed to the railroad through the line haul rates. Somebody is making up the cost. General Motors is getting a benefit that nobody else is getting. That the other similarly situated industries who have private sidings, they are paying their costs, but General Motors is not.

THE COURT: I find it hard to understand that that constitutes a rebate.

MR. STOKES: There are many decisions, your Honor, that say if one company has a service that is not freely available to somebody else that constitutes a form of a rebate, a reference in violation of the Elkins Act. If General Motors can have a private siding where they do not have to bear the cost of a switch connection and the other signed an agreement that they will bear the cost, somebody is being prejudiced and somebody is being in violation of the Elkins Act.

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THE COURT: It's hard for me to understand [illegible] General Motors is in violation because someone else volunteered to enter into anagreement. They suddenly become violators?

MR. STOKES: We told them it is a standard side track agreement which we require of all our shippers.

THE COURT: All right. I would like to hear the ICC before I heard General Motors. You can briefly tell me your position?

MR. RIPPLE: My name is Ripple.

THE COURT: Do you agree with the issue as to whether there is substantial evidence?

MR. RIPPLE: First of all, I am dumbfounded by the question of substantial evidence. If my memory serves me correctly back on May 7th in a pretrial we stipulated there was no question of substantial evidence, your Honor would not have to reweigh the facts. If my memory is wrong, I'm sure the records will show it.

THE COURT: I do not reweigh the facts when I search for compliance with the standards.

MR. RIPPLE: Not reweighing, but re-examine.

THE COURT: I just see if there's enough to

sustain the finding. If there is nothing to sustain the finding, I have a right to set it aside.

MR. RIPPLE: Yes, your Honor. But I believe we had in the record a stipulation to the effect your Honor would not have to look at this case for a question of substantial evidence. I believe those were the words that were used. If my memory serves me correctly you went around to each individual counsel and asked if you so stipulated.

THE COURT: Why is the case here?

MR. RIPPLE: That is a little bewildering to us at this point. I was bewildered after the pre-trial that counsel for the Long Island stipulated to that. Again, I think before we go on today you should probably check the record as to that and go on that. I think that we have set out the issues in our brief. If indeed they have not so stipulated, there is a question of substantial evidence. There is always, every time a Court reviews the commission's decision, along with the overriding question of whether ornot the decision was arbitrary and capricious. The other part of the test is, I think first your Honor, I would like to start with is what is at stake here as far as the statutory test of the

Act regarding the switches which really is the test that this whole case turns on.

I noted counsel for Long Island this morning -- this afternoon mentioned that I forget what he was referring to, but he says these facts were not on the record. I think that the whole problem here and our position is that this case represents merely an evidentiary failure on the part of this Long Island on this record, they fail to fulfull the requirements of the statute, Section 1, Sub 9 to show the present arrangement was not unreasonable.

Now, the test is this: The carrier's obligation is to construct and maintain and operate a switch connection. Two, switch connection can be installed and operated safely. No real contest as to those two points in this case.

The third one, however, is significant in that the switch connection will furnish sufficient business to justify the construction and maintenance. Now, in this case, your Honor, as we explained about the Long Island this morning, the switch connection was voluntarily entered into between the railroad and General Motors in this case. There is no question and indeed I don't think the Long Island Railroad can

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question now that the three part criteria was initially fulfilled. They put in the switch connection at their expense to meet competitive need.

All right, so we don't have a question of construction. But, what we really now have is a question of continued maintenance. Now, the delivery of the freight, your Honor, is an integral part of the transportation services of any carrier to be performed by the carrier and the line haul rates. That is established in all the railroad cases we cited in the brief.

The commission found on the record here that the Long Island Railroad indeed had been paying for and maintained the switches from its line haul rates.

Now, it is also uncontested on the record by the Long Island Railroad, the Long Island has not alleged or shown any change in those original circumstances. They must show a change in one of those circumstances. Of course, they cannot do anything they have to go to the third circumstance. That is again will the switch connection furnish sufficient business. They didn't attack that at all on the record. That is set out very clearly in the record. All what they have done, they have done this

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afternoon is to come in and tell us about their horrendous freight deficits.

THE COURT: Continue, please.

MR. RIPPLE: Now, the commission understands the problem of this railroad and many other railroads. But, I think as your Honor pointed out quite correctly that is not the issue here. The issue is under the statute, did the Long Island meet those three criteria to change the way that that switch connection was being paid for. They didn't try the case in any way to fulfill that three part burden. They put in no evidence to rebut the evidence that was put in by the ICC, as we point out in our brief to the effect that the amount of traffic has not reduced -- I believe it's something like 15 cars, it averages out over two weeks or three cars a day. Thatis how the commission decided this case

THE COURT: On your statement do I have the right to remand it for further hearing then?

MR. RIPPLE: If your Honor finds it's either arbitrary or capricious. The decision of substantial evidence now, the decision being they didn't carry the burden, you have to find indeed they carried the burden or substantial evidence to that effect. We

believe the only recourse you have is to return it to the commission. Now, once the error is laid bare all the Court can do is remand the case to the commission and do it over again.

THE COURT: How about if I found that the Long Island Railroad misconceived its remedy or its issues in the hearing and send it back for an expansion of the evidence on the relevant issue in the case?

MR. RIPPLE: I don't think there is evidence on the record that they misconceived it.

THE COURT: I thought that's what you were saying.

MR. RIPPLE: Not at all. I'm saying they just didn't meet it. That is a different thing, your Honor.

THE COURT: Certainly.

MR. RIPPLE: Of course. The alternative is, and let me get at that very quickly, they gave the Court two alternatives. One, reducing the line haul rates and all the railroads would jump on them and to raise the line haul rates, same problem. The other alternative that they have, it wasn't pointed out, is given on page 698 over to 699 of the report to

leave the line haul rates where it is. Then put it a separate charge on special charge for the maintenance of the switches. That takes care of the other railroads and the division. It's in line with the Wichita Border Trade Decision. The Supreme Court spoke about the problem of grain inspection and putting this additional charge over the line haul.

It is an alternative that the commission is given. I don't see what problem they have. Of course, that right would be then subject that an additional charge would then be subject to review by the commission in a normal type of review. Frankly, the commission was a bit surprised how this case developed. I think it's interesting in a sense. They had the alternative of doing this.

THE COURT: You say they have a right to unilaterally fix a fee or charge for the use of switches. Then General Motors can ask for a review of that before the commission?

MR. RIPPLE: Like any charge. I frankly -- until this question was brought up this morning, I hadn't really thought that deeply about it. As I understand it, theywill be able to set the charge and then it could be subject to suspension.

THE COURT: Like filing a tariff?

MR. RIPPLE: They have to file a tariff, that is my understanding. I will be glad to look into it for the Court and supplementally give you that information to help you with this case. But the problem is we're not putting Long Island into a box with their problem of divisional problems with the other railroads. They have the other alternative.

Indeed, if they show it's true they are in such bad shape on the freight deficit, maybe indeed the commission will be inclined to let the line haul rates stay where it was, they don't want to get into increased problems. But, it might consider this extra surcharge if they can prove what they're saying which I do not think they did in this record.

THE COURT: It's another route, that's the point. Because obviously someone has to pay for the deficits and it's on the back of the passengers if it isn't paid for by the freight.

MR. RIPPLE: I'm not aware of actually how it works in the Long Island Railroad, who's actually paying more than they should.

THE COURT: I don't use the Long Island Railroad, but everyone thinks they are paying for it.

MR. RIPPLE: I used to use it.

THE COURT: You did?

MR. RIPPLE: I used to before I moved to Washington. Now, the last problem I do want to touch on, your Honor, is the matter brought up about the Elkins Act.

The commission again on page 698 handles that question I think completely. We do handle it in the brief at pages 13, 14 of our brief. The question on any Elkins Act case is not whether or not there is a preference, the question is whether it's undue, undue preference. This is how they determine it. It is the difference between someone assigned and someone who has to use the public tracks. If there is a difference in the amount of traffic these people are moving, it is a reasonable difference, it is a reasonable preference. It's not undue then. There are cases to this effect and the commission cites the B&O case, 698. It's one more way of making an argument and I don't think they exactly take it very seriously.

I trust also the constitutionality argument rasied for the first time this afternoon is also put aside otherwise we may run into a three judge court.

THE COURT: I'll not consider the constitutional argument until I decide the other issues cannot be disposed of.

MR. RIPPLE: I'm sure they can be, your Honor and this was not raised in our brief and I am sure it can be. Does the Court have any questions from the Government?

THE COURT: General Motors, how much time are you going to take?

MR. CHARLA: Five to ten minutes.

THE COURT: Suppose you say five minutes. I'll give Mr. Stokes about 30 seconds for rebuttal.

I have a number of people waiting. I think I have to read the briefs anyway.

MR. CHARLA: Your Honor, General Motors is in Court before you today and was in Court to bring its initial motions for a TRO because the Long Island Railroad sought to charge General Motors twice for the same services. That is basically the factual issue.

In 1965 the side track was established and the switch connection was installed. The factor of course, the factor was that the Long Island shares the switch connection and it was agreed by all parties

implicitly, to be included in its line haul rates.

THE COURT: Did they increase the line haul rates at that time?

MR. CHARLA: No. As far as I know the line haul rates were established by tariffs that were in effect already.

THE COURT: How can you say it wasincluded?

MR. CHARLA: Because if it hadn't been included we would have -- we would have been notified that it wasn't included. Nationally this is considered to be in the line haul rates. General Motors has about 130 facilities all over the country. Nowhere are separate maintenance charges for switch connections charged by the railroads.

Now, from 1965 to 1972, sufficient business was furnished over the switch connection to run a profit for the Long Island Railroad on General Motors' freight. This is established in the record before the commission. There are numerous affidavits and exhibits.

In 1972, the Long Island sought, by means of a side track agreement, to impose an additional charge on General Motors for the service, for service on the switch connection. General Motors believed

then and believes now that this was a rate increase, an unpublished rate increase. As you know Section [illegible] of the Interstate Commerce Act requires all railroads to publish their charges in a published tariff that is accessible to the general public.

Changing the side track agreement to impose maintenance charges on the shipper, who formerly had no maintenance charges, is a back door way to get your charges up and it's an attempt, at least it looks like an attempt to avoid the difficult problems involved in getting a new charge in a tariff.

For this reason, when the Long Island sought to suspend services of the switch, we came into Court and went to the commission and the commission agreed with General Motors that the Long Island could not lawfully suspend services over the switch.

General Motors is sympathetic to the plight of the nation's railroads. General Motors believes all carriers are entitled to a fair return on their dollars that they invest and their cost. However, we believe this should be done in a proper way and the proper way since 1989 has been to publish a tariff with the Interstate Commerce Commission.

The Supreme Court in the Wichita Board of Trade

case outlined the three alternatives that Mr. Rippie talked about. The line haul rates could be reduced and a separate charge imposed by tariff. The line haul could stay the same and a separate charge be imposed, and so forth. This is what we believe the Long Island should do if it feels a charge is justified.

We do not know that a charge is justified because in our opinion the Long Island has not proved on the record that any additional charge is justified. But, if the railroad believes there is, General Motors is of the opinion that the railroad should use proper channels to impose these charges and justify them. I think my time is about up; do you have any questions, your Honor?

THE COURT: No, thank you.

Would you like about 30 seconds, Mr. Stokes?

MR. STOKES: Yes, your Honor.

THE COURT: Incidentally, if you want some time to answer briefly or reply briefly, however you characterize it, you can have it. If you think it's fully briefed, there is no necessity for it.

MR. STOKES: Basically, if we could have an additional ten days to file it, your Honor?

THE COURT: Sure.

MR. STOKES: The only point I do want to make --

THE COURT: I'll give you until October 1.

MR. STOKES: Thank you, your Honor.

In response to Mr. Ripple on this other method of obtaining the reimbursement for these costs, filing a tariff: All right, the commission indicated upon a showing that a separate maintenance charge is reasonable and/or nondiscriminatory or preferrential and nonprejudicial, we only seek solely to recover the actual cost involved with that switch. General Motors -- in the General Motors case it is 3,000-something, whatever, depending on the type of operating line. The switch is located on some line that is used by passenger trains which has to be interlocked and the electricity charges, you can have different costs. One switch might cost 2 or $300,000, the cost varies as to what the actual maintenance will be.

THE COURT: The interstate?

MR. STOKES: It's not a uniform cost.

THE COURT: The Interstate Commission and General Motors is sympathetic to your plight and they see there may be a direct route in getting relief.

They just say this is not the way, insisting on a private agreement to pay for the cost.

MR. STOKES: I would have no objection to your Honor holding this case open, holding jurisdiction while we file the necessary briefs next week if they want us to do it by tariff rather than an agreement, we'll do it this way.

But I would ask your Honor to hold the case open and see if they really mean what they say.

Let us get our reimbursement. I don't care whether it's a tariff or an agreement as long as we get the reimbursement.

THE COURT: Why should that matter? If I decide to hold it open, all I can decide, if there is substantial evidence, that doesn't prove it by going anotherroute. It's not a res judicata problem.

MR. STOKES: They're saying we have this other way. But, that they're also saying it's subject to suspension and everything else.

THE COURT: We must understand they are guaranteed nothing.

MR. STOKES: I understand.

THE COURT: They're saying there is another route and this is the wrong way. That is all they are

saying.

MR. STOKES: I'm saying I don't think that route is going to be successful for the Long Island. I still feel the only way we can obtain reimbursements are through these agreements. If this other route is a true route, I'm willing to try it.

THE COURT: Why not try it that way but don't condition it on me holding up the decision. I don't think it warrants that.

MR. STOKES: If I can do it without prejudice?

THE COURT: I don't see how anything I could do or say here would prejudice any new application. If I decide against you, I might say that very thing, because the Interstate Commerce Commission indicates that even if you lost here, you're precluded from seeking relief. You understand that is the position ofthe Interstate Commerce Commission?

MR. RIPPLE: That's what the opinion said. We told them to come back and make another record.

THE COURT: Decision reserved until October 1 for briefs, if you don't think youfully covered the point.

MR. RIPPLE: We might want to send a page or two in.

TRANSCRIPT

MR. CHAMLA: Thankyou.

MR. STOKES: Thank you very much, your Honor.

(Whereupon, these proceedings were concluded.)

* * *

MEMORANDUM DECISION AND ORDER OF MISHLER, CH. J.

THE LONG ISLAND
RAIL ROAD COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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72 C 1549

GENERAL MOTORS CORP.,

Plaintiff,

-against-

Memorandum of Decision
and Order

THE LONG ISLAND RAIL
ROAD COMPANY,

November 19, 1976

Defendant.

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MISHLER, CH. J.

Plaintiff seeks an order affirming a decision of the Interstate Commerce Commission and permanently enjoining suspension of rail freight service over a switch connection maintained by the defendant. Jurisdiction here is predicated on §17(9) of the Interstate Commerce Act, 49 U.S.C. §17(9), and 28 U.S.C. §§1336, 1337 and 1398.

The General Motors Corporation (GMC) is a Delaware corporation, licensed to transact business in the State of New York. One of the company's unincorporated divisions, General Motors Parts Division, is located in Bethpage, Long Island. From its Parts Distribution Center in

Bethpage, GMC conducts warehousing and distribution operations, receiving an average of ten to fifteen rail freight carloads of automobile and truck parts each week. The defendant, the Long Island Rail Road Company (LIRR), a rail freight carrier, provides rail service to the parts facility's private sidetrack by way of a switch connection. It is over the maintenance cost of the switch connection that the parties—the giant of automobile manufacturers and a less than thriving railroad—do battle.

In 1965, when the Bethpage sidetrack was placed in service, the LIRR bore the expense of maintaining both the switch connection and that portion of the sidetrack located within its right-of-way, while GMC paid for the maintenance of the remainder of the sidetrack. Beginning in 1970, because of its severe financial problems, the LIRR sought to require GMC and other private sidetrack users to assume, by way of a separate charge, the maintenance expenses of their switch connections. When GMC refused to pay the switch connection maintenance costs, the LIRR threatened to terminate service to the Bethpage sidetrack. In response, on November 14, 1972, GMC obtained a temporary restraining order, enjoining the LIRR from halting rail service. Sub-

sequently, pursuant to this court's order of December 7, 1972, the parties submitted the dispute to the Interstate Commerce Commission (ICC). On May 6, 1974, the administrative law judge ruled that the LIRR was adequately compensated for the maintenance expenses of the switch connection and that the LIRR could not halt rail service to the private sidetrack. The decision of the administrative law judge was affirmed by the ICC on June 10, 1975. Upon reconsideration of its own motion, the ICC again affirmed the administrative law judge's ruling. Following this ruling, the plaintiff applied to this court for a permanent injunction restraining defendant from halting service on the sidetrack at the Bethpage facility. The defendant seeks to set aside the decision of the ICC.

Under §1336(b) of 28 United States Code, when a district court refers a dispute to the Interstate Commerce Commission,

> the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

However, the scope of judicial review of the ICC's orders

is strictly limited. 5 U.S.C. §706. The reviewing court is restricted

> to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene.

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 536, 66 S.Ct. 687, 698 (1946). See AAACon Auto Transport Inc. v. United States, 317 F. Supp. 1314, 1315 (S.D.N.Y. 1970); Neptune World Wide Moving, Inc. v. United States, 284 F. Supp. 135, 138 (S.D.N.Y. 1968); James Hughes, Inc. v. United States, 292 F. Supp. 372, 373 (S.D.N.Y. 1968). See also Resort Bus Lines, Inc. v. Interstate Commerce Commission, 264 F. Supp. 742, 746 (S.D.N.Y.1967). Thus, this court does not have the power to disturb the ICC's ruling unless it is "contrary to law, arbitrary, capricious, or unsupported by substantial evidence based on the record before it." Seaboard Airline Railroad Co. v. United States, 387 F.2d 651, 656 (Ct.Cl. 1967); see McLean Trucking Co. v. United States, 387 F.2d 657 (Ct.Cl. 1967).

In the present case, the parties were in

essential agreement on the facts. Thus, the only issue for this court is whether the ICC correctly interpreted and applied the relevant statute, §1(9) of the Interstate Commerce Act, 49 U.S.C. §1(9).[1] This statute requires any common rail carrier to construct and maintain on reasonable terms a switch connection between the railroad's own tracks and the private sidetrack of an interstate shipper, provided the switch connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." If the shipper's application to the railroad for a switch connection is refused, the shipper can request an investigation by the ICC, which, after making findings of practicability and safety, may order the carrier to construct the switch connection.

The ICC, in its final decision on reconsideration, General Motors Corp. v. Long Island Rail Road Company, 351 I.C.C. 691 (1976), concluded that GMC had met the statutory criteria of §1(9) entitling it to a switch connection: the connection could be installed and operated with safety; the switch connection was reasonably practicable; and the connection would furnish sufficient

business to justify its construction and maintenance. See Imperial Wheel Co. v. St. Louis, I.M. & S. Ry. Co., 20 I.C.C. 56, 59 (1910). Since there had been no change in these conditions, "respondent's statutory obligation to provide switch connection service remains." Id. at 696. This finding was supported by substantial evidence, and we need not elaborate further. With respect to the LIRR's claim that it was not receiving reasonable compensation, and therefore was entitled to impose a maintenance charge on GMC, the ICC stated:

> An additional charge for maintenance of switch connections could result in over compensation for the maintenance of such connections. The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges.

Id. at 697-98.

In seeking to set aside the ICC's ruling, the LIRR claims that, contrary to the Commission's interpretation, §1(9) requires the shipper to assume the maintenance charges, that a carrier is not required to recoup the cost of maintaining a switch connection from its line haul

rates; and that imposition of separate maintenance costs is necessary to avoid discriminating against other shippers. These arguments are unpersuasive, and we find that the ICC decision as to the adequacy of compensation is supported by substantial evidence and that its interpretation of §1(9) is not unreasonable. Accordingly, the Commission's decision is affirmed.

The basic issue before the ICC was whether the LIRR was receiving reasonable compensation for its maintenance of the switch connection.[2] Between 1954 and 1970, the LIRR was responsible for the construction and maintenance costs of the switch connections.[3] At the same time, however, the switch connection was part of the LIRR's entire freight transportation network. Thus, it was necessary for the LIRR to establish that its line haul rates for freight operations did not fully compensate it for the maintenance costs of the switch connection. It attempted to do this with figures attesting to the railroad's financial deterioration. In 1972, for example, the LIRR had total freight revenues of approximately $9.2 million, total freight operating expenses of about $20.7 million, and a net loss from freight operations of $11.5 million.

While these figures are a dramatic indication of the LIRR's financial plight, they are inconclusive of the issue of whether the line haul rates adequately compensated the railroad for its maintenance of the switch connection. Presumably, the line haul rates reflect the cost to the LIRR of the different aspects of its freight operations. The Commission observed, for example, that "maintenance costs are usually changeable [sic] to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch connection." 396 I.C.C. at 697. See Valley & Siletz R.R. Co. v. Southern Pacific Co., 53 I.C.C. 397, 399 (1919); Klamath County Chamber of Commerce v. Southern Pacific, 74 I.C.C. 207, 213 (1922). See also Merchants Refrigerating Co. v. N.Y.C.R.Co., 238 I.C.C. 599 (1940). Moreover, figures supplied by an independent consultant hired by the LIRR indicate that the rail traffic to the GMC plant at Bethpage produced at least a marginal profit for the railroad. /4 The large operating deficits incurred by the LIRR's entire freight division could be attributed to any number of factors. To further illustrate the irrelevance of the profit-loss figures for the entire freight operations,

under conceivable circumstances, the LIRR could be making a profit on its overall freight operations, and yet be undercompensated for the maintenance cost of the switch connection on the Bethpage track. In that situation, despite the hypothetical profits from other aspects of the LIRR's freight operation, the railroad would be entitled to adequate compensation for the switch connection maintenance.

The ICC's ruling in Allied Container Corp. v. Maine Central, Dkt. No. 36143 (Apr. 29, 1976), does not compel a different result. In that case, which does not yet represent the views of the ICC, the shipper objected to the railroad's imposition of the costs of constructing and maintaining a switch connection. The ICC applied the rationale of its earlier decision in General Motors, supra, concluding that the customary practice of the Maine Central in requiring the shipper to bear the costs of the switch connection was not unreasonable:

> The evidence demonstrates that Maine Central has maintained the same policy for the past 50 years requiring industry to bear the costs of installation and maintenance of private sidetracks including switch connections and spurs or lead tracks. By so doing defendant has not charged those costs to operating expenses, they have not formed a part of its

> rate base, are not recovered by revenue from the line-haul rates and there is no duplication or over compensation. In fact, since such costs are borne by industry, its rate level should be lower than if those costs were borne by the carrier.

Slip.op. at 7.

By contrast, in the present case, when the Bethpage switch connection was built, the LIRR's policy was not to impose a separate maintenance charge on private sidetrack shippers. By implication, the line haul rates absorbed the maintenance cost of the switch connection. Thus, in 1970, when the LIRR changed its policy of the last sixteen years, and sought to impose an additional maintenance charge, it had the burden of demonstrating that the line haul rates did not already provide adequate compensation for the maintenance of the Bethpage switch connection.

In the final analysis, the point is not that the LIRR is precluded from recovering the costs of the switch connection by either an increase in the line haul rates or a separate reasonable maintenance charge, /5 but that it has failed to demonstrate that it currently is undercompensated for these costs. This was the conclusion of the Commission, and we find that there was substantial

evidence in the record to support it.[6/]

Accordingly, we grant the application of the plaintiff for a permanent injunction restraining the LIRR from suspending service to the plaintiff's private track because of GMC's refusal to assume the maintenance cost of the switch connection, and it is

SO ORDERED.

Jacob Mishler
U. S. D. J.

## FOOTNOTES

/1 Section 1(9) of the Interstate Commerce Act provides:

> Switch connections and tracks. Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, in application therefor in writing by any shipper or owner of such lateral branch line of railroad, such shipper or owner of such lateral branch line of railroad may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

/2 The average annual maintenance cost of the General Motors' switch connection and private siding is $3,266.80 (Exhibit B, Brief of the LIRR Before the Interstate Commerce Commission).

/3 Prior to 1954, the practice of the LIRR was to require industries with private sidings to bear the entire maintenance cost of the switch connection. This practice was changed after 1954 in order to maintain a competitive position in the transportation industry. Since 1970, according to the railroad, increasing deficits in the freight service compelled the return to the original practice of requiring industries to bear the entire cost of their private sidings. Compare Allied Container Corp. v. Maine Central R.R.Co., Dkt. No. FD-36143 (Apr. 29, 1976). General Motors claims that in 1965, when the switch connection was built, the parties implicitly agreed to include its maintenance costs in the line haul rates (Sept. 17, 1976, Tr. 27-28). While the line haul rates were not increased at that time, nonetheless there is no evidence that the existing 1965 rates failed to compensate the railroad for the cost of

/3 continued

freight operations on the Bethpage tracks, including maintenance of the switch connection. Similarly, there is no reason to believe that the present line-haul rates inadequately compensate the railroad for its entire Bethpage operation, switch connection maintenance included.

/4 According to Joseph Remington, a transportation consultant who performed a cost analysis of General Motors' rail traffic from various origins to Bethpage, Long Island:

> [t]he traffic from Michigan and Ohio origins does produce a contribution for the railroads both in a variable cost basis and on a fully allocated cost basis. When the 38 shipments as a whole are considered, the deficits produced by the Martinsburg [West Virginia] traffic so offsets the contribution from the Michigan and Ohio traffic, that the profitability of the traffic to the railroads becomes extremely marginal at best and when considered in light of the costs of maintaining the switch connection and trackage, the value of the traffic to the railroads and LIRR in particular becomes very questionable.

(Brief for L.I.R.R. Before the I.C.C., Remington Affidavit).

However, despite the doubts of Mr. Remington, his analysis does not specifically suggest that the line haul

rates for the Bethpage plant are inadequate to cover operating expenses, including maintenance of the switch connection. Rather, he relies on the overall deficit of the LIRR's freight operations to establish that the LIRR sustains a substantial loss from the GMC freight. It is difficult, however, to understand the relationship between the railroad's entire freight operations deficit and the question of whether the cost of a single switch connection is adequately compensated by the line haul rates. The mere fact that a railroad suffers serious deficits in its freight operations does not entitle it to additional compensation for a switch connection when it is unable to establish that the cost of the connection is not adequately compensated by existing freight rates.

/5 GMC also contends that imposition of a maintenance charge by the LIRR "for a service previously included in the carrier's line haul rates can only be construed as an unlawful rate increase in violation of §§1(6) and §6(1)." (Brief After Trial of Plaintiff, at 2.) Inasmuch as we affirm the ICC's conclusion that the LIRR has been unable to demonstrate in the first instance that its line haul

/5 continued

rates provide inadequate compensation for the cost of the switch connection, there is no need to consider the question of whether imposition of maintenance charges pursuant to 49 U.S.C. §1(9) is subject to the publication requirement of 49 U.S.C. §6(1), which requires that a change in rates must be listed with the ICC and kept open for public inspection. See Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U. S. 800, 93 S.Ct. 2367 (1973).

However, as a practical matter, if the LIRR felt that it was entitled to additional compensation for maintenance costs of any of its numerous switch connections, the simplest approach would be to file a rate increase. The shipper, of course, would then be entitled to challenge the proposed new charge. Under this procedure, the burden of proof, if the proposed rate increase is challenged before it goes into effect, would be on the carrier to show that the proposed rate is just and reasonable. 49 U.S.C. §15(7).

Otherwise, the somewhat unusual and time-consuming procedural posture of this case is likely to be repeated.

/5 continued

Parenthetically, our decision in this case applies only to the adequacy of the LIRR's compensation for the Bethpage switch connection, and in no way precludes the railroad from seeking additional compensation, where justified, for its maintenance of other switch connections.

/6 The plaintiff also argues that requiring the railroad to absorb the cost of the switch connection discriminates against smaller shippers that only use public tracks as well as those private-track users who have already agreed to pay additional charges for their switch connection. Again, we emphasize that our decision does not require the railroad to pay for the maintenance of the switch connection; rather, we find that the LIRR has failed to prove that its line haul rates are inadequate to compensate it for the maintenance costs. This may or may not be the situation with respect to the other private track shippers. As to the public track shippers, it may be true that private sidetrack placement is more expensive than public track. Nonetheless, the public track shippers benefit from the private track shipping through reduced

6/ continued

congestion and inconvenience that would exist on the public tracks if private track shipping were diverted there. For these reasons, we reject the argument that GMC's failure to pay the proposed maintenance fee would involve a violation of the Elkins Act, 49 U.S.C. §41 et seq., which forbids unlawful rebates or concessions.

* * * * * * * * * * *

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

GENERAL MOTORS CORPORATION
A Corporation of the State of Delaware,

Plaintiff,

-against-

72 C 1549

THE LONG ISLAND RAILROAD COMPANY
A Corporation of the State of New York,

NOTICE OF APPEAL

Defendant.

----------x

THE LONG ISLAND RAIL ROAD COMPANY,

Third Party Plaintiff,

-against-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Third Party Defendants

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Intervening Third Party
Defendant

----------x

SIRS:

PLEASE TAKE NOTICE, that the above named defendant and third party plaintiff, The Long Island Rail Road Company, hereby appeals to the United States Court of Appeals for the Second Circuit from each and

# NOTICE OF APPEAL

every part of the Decision and Order of the Honorable Jacob C. Mishler, United States District Judge, Eastern District of New York, dated November 19, 1976, and filed and entered in the Office of the Clerk of the Court on November 22, 1976.

Dated: Jamaica, N.Y.
December 15, 1976

Yours, etc.

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Sworn to before me
this 4th day of January , 1978.

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Notary Public

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